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Title: Independent Federation of Flight Attendants, Petitioner
v.
Anne B. Zipes, et al.

Docketed:
October 11, 1988

Court: United States Court of Appeals for the Seventh Circuit

See also:
88-664

Counsel for petitioner: Fehr,Steven A.

Counsel for respondent: Hartunian,Aram A.

Entry	Date	Note	Proceedings and Orders
1	Oct 11 1988	G	Petition for writ of certiorari filed.
2	Nov 8 1988		Brief of respondents Anne B. Zipes, et al. in opposition filed.
3	Nov 16 1988		DISTRIBUTED. December 2, 1988
4	Nov 16 1988	X	Reply brief of petitioner Independent Federation of Flight Attendants filed.
5	Dec 21 1988		REDISTRIBUTED. January 13, 1989
6	Jan 17 1989		Petition GRANTED.
			**
7	Feb 16 1989		Record filed.
		*	Certified copy of C. A. proceedings received.
8	Mar 3 1989		Joint appendix filed.
9	Mar 3 1989		Brief of petitioner Ind. Fed. of Flight Atten. filed.
10	Mar 3 1989		Brief amici curiae of United States and EEOC filed.
11	Mar 3 1989		Brief amicus curiae of International Association of Fire Fighters, AFL-CIO filed.
12	Mar 3 1989		Brief amicus curiae of Americans United For Life Legal Defens Fund filed.
13	Mar 8 1989		SET FOR ARGUMENT, APRIL 25, 1989. (2nd CASE)
16	Apr 3 1989	X	Brief of respondents Anne B. Zipes, et al. filed.
17	Apr 3 1989	X	Brief amici curiae of ACLU, et al. filed.
14	Apr 5 1989		CIRCULATED.
18	Apr 18 1989	X	Reply brief of petitioner Ind. Fed. of Flight Atten. filed.
19	Apr 24 1989		Letter from Counsel for petitioner received and distributed.
20	Apr 24 1989		Record filed.
		*	Certified copy of original record received.
21	Apr 25 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

88-608 (1)

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Petitioner,

v.

ANNE B. ZIPES, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

May a court award attorney's fees in favor of plaintiffs and against a labor union-intervenor pursuant to § 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), under the same standard by which fees are awarded in favor of prevailing plaintiffs and against defendants found to have violated federal law, when:

(a) the union-intervenor was neither accused of nor found to have engaged in any illegal acts, and

(b) the sole purpose of the union's intervention was to object (unsuccessfully) to a proposed settlement of plaintiffs' claims which would modify and/or override provisions of the union's collective bargaining agreement and endanger the job security of employees in the bargaining unit, not parties to the litigation, whom the union has an obligation to represent?

PARTIES

As is made clear in our Statement of the Case, Petitioner is a labor union and was an intervenor at the District Court. Trans World Airlines, Inc. ("TWA"), the only defendant below, is not involved in the dispute for which review is sought and did not participate in the appeal to the Seventh Circuit. Plaintiffs-Respondents are a class of TWA flight attendants who were terminated on account of motherhood between July of 1965 and October of 1970.

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IN THE

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INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
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v.

ANNE B. ZIPES, *et al.,*
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Independent Federation of Flight Attendants ("IFFA"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on May 6, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is officially reported at 846 F.2d 434, unofficially reported at 46 FEP 1503, and reprinted in the Appendix to this Petition at Pet. App. 1a. The opinion of the United States District Court for the Northern District of Illinois is officially published at 640 F.Supp.

861, unofficially published at 46 FEP 1497, and reprinted at Pet. App. 24a. A September 18, 1986 Order of the District Court modifying its previous judgment has not been published but is reprinted at Pet. App. 38a.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1988. A timely Petition for Rehearing with Suggestion for Rehearing In Banc was filed on May 19, 1988. The Petition for Rehearing was denied on July 22, 1988, with four Circuit Judges voting to grant rehearing in banc, and one not participating. (Pet. App. 22a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This Petition involves Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, specifically Section 706(k), 42 U.S.C. § 2000e-5(k), which provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for the costs the same as a private person.

[1] The opinion below is the seventh Seventh Circuit opinion to issue in this litigation. In chronological order, the other six are: *ALSSA v. American Airlines, Inc.*, 455 F.2d 101 (7th Cir. 1972); *ALSSA v. American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974); *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142 (7th Cir. 1978); *ALSSA v. TWA*, 630 F.2d 1164 (7th Cir. 1980); *ALSSA v. TWA*, 713 F.2d 319 (7th Cir. 1983); and *Freedman v. ALSSA*, 730 F.2d 509 (7th Cir.), *cert. denied*, 469 U.S. 899 (1984). This litigation has also produced one Supreme Court opinion, *Zipes v. Trans World Airlines, Inc.*, 4 5 U.S. 385 (1982).

STATEMENT OF THE CASE

A. Preliminary Statement

The federal civil rights statutes contain fee-shifting provisions authorizing an award of attorney's fees in favor of a "prevailing party".[2] This Court has spoken to the standards under which these provisions should be applied when prevailing plaintiffs seek an award of fees from defendants who stand as proven violators of federal law; and also when prevailing defendants seek an award of fees from unsuccessful plaintiffs. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). The Court has never spoken to the issue of what standard is to be applied to other parties who are neither the victims nor the perpetrators of the alleged discrimination, but who intervene to be heard because the resolution of the litigation will affect their rights. That is the question squarely presented by this Petition.

Petitioner Independent Federation of Flight Attendants ("IFFA") is a labor union which was never accused of discrimination; indeed, IFFA's predecessor played *the* major role in eliminating the discrimination at issue. IFFA intervened only, as the dissent below noted, when it became clear that the settlement of this litigation would override its collective bargaining agreement and endanger the jobs of its members. The court below nonetheless chose to award fees against IFFA and in favor of plaintiffs under the same standards by which fees are "almost automatically" assessed against defendants adjudged to have violated the law. The Panel majority reached this result only over a strong dissent and after expressly refusing to follow the decision of the Eleventh Circuit in *Reeves v. Harrell*, 791 F.2d 1481 (11th Cir. 1986), *cert. denied*, —— U.S. ——, 107 S.Ct. 880 (1987).

[2] We refer not only to § 706(k) of Title VII, but also to § 204(b) of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b), and 42 U.S.C. § 1988, which are "substantially identical" to Section 706(k). *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416 (1978).

In addition, while IFFA's Petition for Rehearing was denied, four judges of the Seventh Circuit voted to grant rehearing in banc.

B. Procedural History Of This Litigaiton

Since April 1, 1977, IFFA has been certified pursuant to the Railway Labor Act (45 U.S.C. § 151, *et seq.*) as the labor union representing flight attendants in the employ of Trans World Airlines, Inc. ("TWA"). In 1970, the union which was IFFA's predecessor, the Airline Stewards and Stewardesses Association ("ALSSA"), filed this lawsuit as a class action on behalf of all TWA flight attendants who since July 2, 1965 had been terminated due to TWA's "no-motherhood" rule. TWA was the sole defendant. The complaint alleged that TWA's policy violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* Shortly after the suit was filed, TWA abandoned its no-motherhood policy pursuant to a new collective bargaining agreement with ALSSA. In 1971, a settlement was reached which would have allowed all of the terminated flight attendants to return to work, with each plaintiff retaining the seniority she held at the time of her termination. However, the Seventh Circuit reversed the District Court's approval of this settlement, perceiving that the union, as class representative, had a conflict between obligations it owed to Plaintiffs and obligations it owed to incumbent flight attendants who might be affected as a result of any settlement. (Pet. App. 2a-3a); *ALSSA v. American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974).[3] As a result of this decision, ALSSA was removed as class representative.[4]

[3] For a time this case was consolidated with a similar action filed against American Airlines.

[4] Counsel for Plaintiffs and ALSSA testified (somewhat prophetically) that he supported the first settlement because approximately 90% of the class faced a serious legal question as to whether their claims were time-barred. 490 F.2d at 639-40.

In 1978, the Seventh Circuit held that TWA's no-motherhood policy was indeed illegal, but that the claims of approximately 92% of the Plaintiffs were untimely. *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142 (7th Cir. 1978). The court held that TWA had not engaged in a "continuing violation", and that the claims of all flight attendants terminated more than 90 days before the union had filed its first charge with the Equal Employment Opportunity Commission (EEOC) in 1970 were time-barred pursuant to 42 U.S.C. § 2000e-5(d).[5] *Id.* at 1150. The court then went on to address Plaintiffs' secondary argument that TWA had waived the timeliness defense. The Seventh Circuit stated that although this claim was questionable,[6] the Title VII time limit was a "jurisdictional prerequisite" which could not be waived. *Id.* at 1151. In so ruling, the court cited statements by the Supreme Court characterizing the Title VII time limit as a "jurisdictional prerequisite".[7]

Following the issuance of the *Consolidated* opinion, Plaintiffs sought *certiorari* on the jurisdictional issue only (No. 78-1545); no review was sought of the Seventh Circuit's ruling that TWA had not engaged in a "continuing violation" and that most Plaintiffs' claims were therefore time-barred. TWA cross-petitioned (No. 78-1549). While these petitions were pending in June of 1979, the parties

[5] The time limit is now 180 days and contained in 42 U.S.C. § 2000e-5(e).

[6] The waiver argument is based upon TWA's failure to set forth the timeliness defense in its original answer, although it was included in an amended answer filed in 1974. (*Pet. App.* 47a). By 1968, however, the Seventh Circuit was already on record as characterizing the Title VII time limit as "jurisdictional". *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357, 359 (7th Cir. 1968).

[7] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 557 n.9 (1977).

entered into another settlement: $3,000,000 was to be divided among the class members, half to the approximately 30 women with timely claims (Subclass A), and half to the approximately 400 women whose claims were time-barred according to the Seventh Circuit (Subclass B). More importantly, perhaps, each class member was to be allowed to regain her job (13-18 years later) with full retroactive competitive seniority. (Pet. App. 3a). The Settlement Agreement also specifically purported to supersede existing collective bargaining agreements, which, of course, included the IFFA-TWA contract. (Pet. App. 53a).

At this point, IFFA intervened to object to the "settlement that substantially altered its contract with TWA and the job security of its members". (Pet. App. 20a). We argued (1) that if (as the Seventh Circuit had already held in *Consolidated*) there was no subject matter jurisdiction over Plaintiffs' claims, the court had no jurisdiction to approve the settlement, grant seniority, and override the collective bargaining agreement; and (2) regardless of the jurisdictional issue, a grant of seniority to Plaintiffs was inappropriate here, where Plaintiffs had failed to prove their claims but instead had settled, and the grant of seniority would harm innocent incumbent employees and override the collective bargaining agreement.

Both the District Court and the Seventh Circuit overruled our objections and affirmed the settlement. The District Court held that it had jurisdiction because the Seventh Circuit opinion finding there was no jurisdiction was not final. The Seventh Circuit held that the "principles favoring settlements" gave the court jurisdiction to approve and enforce the settlement regardless of whether there was subject matter jurisdiction to hear the merits of the claims. *ALSSA v. TWA*, 630 F.2d 1164, 1166, 1169 (7th Cir. 1980). IFFA petitioned for and was granted *certiorari* (No. 80-951), but the Supreme Court also at the same time granted *certiorari* on the

petitions (Nos. 78-1545 and 78-1549) which had been held in abeyance since 1978. (450 U.S. 979).

The Supreme Court issued its decision *sub nom. Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982).[8] The Court did not choose to answer the question (presented by IFFA in No. 80-951) of whether a court had jurisdiction to enforce a settlement when the court believed it had no subject matter jurisdiction; instead it decided that the Seventh Circuit had been wrong when (in the *Consolidated* opinion in 1978) it characterized the Title VII time-limit as a jurisdictional prerequisite which could not be waived. The Court held that the time-limit is not jurisdictional, and *could* be waived. There was, therefore, subject matter jurisdiction to approve and enforce the settlement, and thus the Court affirmed the order approving the settlement (although for entirely different reasons than those used by both lower courts).[9]

C. The Effect Of The Settlement Upon The Incumbent Employees

Shortly after the Settlement Agreement was signed in June of 1979, TWA entered into a recessionary period (as IFFA had feared). Hundreds of flight attendants were placed on involuntary furlough beginning in October of 1979. TWA hired no flight attendants, and had no flight attendant vacancies from 1979 until 1983, when

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[8] TWA's Cross-Petition in No. 78-1549 was removed from the calendar prior to briefing and argument (451 U.S. 980) and eventually dismissed as improvidently granted (455 U.S. at 392, n.5).

[9] While the Supreme Court determined that TWA could theoretically waive the timeliness defense, neither the Supreme Court nor the Seventh Circuit nor the District Court ever determined whether or not such a waiver had occurred (or whether that waiver could be binding on third parties affected by the resolution of the case). The Seventh Circuit specifically acknowledged this point in a post-*Zipes* opinion in this litigation. *Freedman v. ALSSA*, 730 F.2d at 512, n.5.

Plaintiffs were reemployed. (Pet. App. 41a). Indeed, in 1982, Plaintiffs sought to force TWA to immediately reinstate them regardless of whether vacancies existed. The Seventh Circuit, however, ruled that pursuant to the Settlement Agreement TWA was not obligated to rehire Plaintiffs until vacancies existed. *ALSSA v. TWA*, 713 F.2d 319 (1983).

Of the incumbents furloughed in 1979, more than 150 were never recalled. Those flight attendants effectively lost their jobs due to the injection of hundreds of Plaintiffs into the work force with retroactive competitive seniority. (Pet. App. 41a).

D. The Attorney's Fees Issues

Shortly after the *Zipes* decision in February of 1982, Plaintiffs' counsel sought an award of fees of nearly $1,400,000 from the $3,000,000 settlement fund. The District Court approved this request in June of 1982. (Pet. App. 43a, 44a). Of this amount, $1,250,000 went to counsel for Subclass B based on hourly rates of up to $160 per hour plus a multiplier of two.

Plaintiffs' counsel also sought fees from IFFA pursuant to § 706(k). In 1986, the District Court awarded fees against IFFA and in favor of Plaintiffs in the amount of $180,915.84. (Pet. App. 5a).

IFFA appealed, and a divided panel affirmed on May 6, 1988. In so ruling, the Panel majority acknowledged that while the Supreme Court (in *Christiansburg Garment*) had articulated the standards upon which successful plaintiffs should be awarded fees against defendants who are proven violators of federal law, and also the standard upon which successful defendants could be awarded fees from unsuccessful plaintiffs, the "Supreme Court has never explicitly considered the standard applicable to a request for an award of fees against an unsuccessful intervenor . . ." (Pet. App. 9a). The

majority then stated its *explicit disagreement* with the Eleventh Circuit opinion in *Reeves v. Harrell, supra*, which held that parties who intervene in civil rights cases to claim that the resolution of those cases abridges their rights should be treated as plaintiffs for attorney's fees purposes. (Pet. App. 11a, 13a). The majority went on to affirm the award of fees against IFFA under what the dissent characterized as "the same standard applicable to defendants who have violated their employees' civil rights." (Pet. App. 18a-19a).

The dissent found the majority's result inconsistent with this Court's holding in *Christiansburg Garment*, as well as the Eleventh Circuit's in *Reeves*, with which it agreed. The dissent also noted the irony of the Panel majority's ruling, since the Seventh Circuit itself had once admonished the union about its duty to represent the incumbent employees:

> [T]his circuit dismissed the incumbent employees' predecessor union as the plaintiffs' class representative specifically because the union's interest in representing the collective bargaining rights of the incumbent employees conflicted with its position as class representative. See *Air Line Stewards and Stewardesses Ass'n, Local 550 v. American Airlines, Inc.*, 490 F.2d 636, 639-42 (7th Cir. 1973). The fact that the IFFA did what its members elected it to do and this circuit expected it to do, that is, represent the interests of incumbent employees, is not something that should subject it to Title VII attorneys' fees. (Pet. App. 20a).

Finally, the dissent noted that the majority's result would have a chilling effect upon the rights of innocent incumbent employees whose rights are affected by the resolution of civil rights cases:

> Many of these affected employees will have substantial claims that the settlement or remedies violate their own rights under a collective bargaining agree-

ment, Title VII, or even the Constitution. The just resolution of these cases requires the full participation of everyone involved. Mechanically assessing attorneys' fees against intervening employees who did not violate anybody's rights and who are not fortunate enough to posture themselves as "plaintiffs," will ensure that in many cases only two sides will be heard in a multi-sided dispute. (Pet. App. 21a).

A timely Petition for Rehearing, with Suggestion for Rehearing in Banc was filed. On July 22, 1988, rehearing was denied, *with four judges voting to grant rehearing.* (Pet. App. 22a).

REASONS FOR GRANTING THE WRIT

I. The Importance Of The Issue

The civil rights fee-shifting statutes by their terms make no distinction between parties, be they plaintiffs, defendants, or intervenors. However, in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), the Court held that plaintiffs who prevail against defendants should ordinarily receive an award of fees unless special circumstances exist. 434 U.S. at 417. On the other hand, defendants who prevail against plaintiffs are to receive an award only upon a finding that the action brought was "frivolous, unreasonable or without foundation . . . ." 434 U.S. at 421.[10]

The reasons for ordinarily awarding fees to plaintiffs (who prevail against defendants) are:

(1) When a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law; and

[10] In *Christiansburg Garment*, the Court was expanding upon the standards established a decade earlier in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), a case involving § 204(b) of Title II of the Civil Rights Act of 1964.

(2) A private plaintiff is the chosen instrument of Congress and an award of fees will make it easier for a plaintiff of limited means to bring a meritorious suit.

(434 U.S. at 418, 420).

But these factors, the Court said, are "wholly absent in the case of a prevailing Title VII defendant." (434 U.S. at 418). Prevailing defendants are not ordinarily entitled to an award of fees against unsuccessful plaintiffs. As the Court said:

> No matter how honest one's belief that he had been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery of trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit. (434 U.S. at 422).

Applying these teachings to the facts of this case, it is clear that one of the two reasons given for presumptively awarding fees to plaintiffs is "wholly absent". IFFA did not violate the law; it merely attempted to enforce its contract and represent the interests of innocent incumbents affected by the settlement. The other reason given in *Christiansburg* for awarding fees to prevailing plaintiffs—to make it easier for plaintiffs of limited means to bring suit—is of tenuous, if any, applicability here. As the dissent below noted, before IFFA intervened counsel for plaintiffs had already voiced their intention to seek a seven-figure fee which surely provided counsel with ample incentive to proceed. Moreover, in any Title VII case where plaintiffs prevail there will always be a wrongdoer defendant who may be assessed

fees; it is not necessary for innocent and adversely affected employees to pay plaintiffs' lawyers.[11]

However, the reasons given in *Christiansburg Garment* for *not routinely* awarding fees against plaintiffs have an almost eerie applicability to the facts of this case. The law changed dramatically in the midst of litigation. The District Court, Court of Appeals, and Supreme Court each used an entirely different rationale. The appellate opinion which formed the basis for IFFA's intervention at the District Court was reversed. Statements made by this Court before, in, and after the *Zipes* opinion make it clear that IFFA had a very reasonable basis for going forward.

Accordingly, IFFA believes it should be judged for attorney's fees purposes as if it were an unsuccessful plaintiff. But more is at stake than the soundness of that position. This Court has shown a distinct sensitivity to the dilemma of innocent incumbent employees affected by Title VII remedies, as well as that of unions not guilty of discrimination which must nonetheless participate in remedial proceedings. *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 781-2 (1976) (Burger, C. J., concurring in part and dissenting in part); *Teamsters v. U.S.*, 431 U.S. 324, 356, n.43 (1977); *Zipes v. TWA*, 455 U.S. at 401, n.1 (Powell, J, concurring); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 240 (1982); *Firefighters v. Stotts*, 467 U.S. 561, 579 (1984); and *Local 93 v. City of Cleveland*, 478 U.S. 501, 106 S.Ct. 3063, 3079 (1986). Is the union which participates in remedial proceedings as required by *Teamsters* and which asserts its rights under its contract as well as

[11] In addition, in *Piggie Park* the Court noted that a civil rights plaintiff will often need to seek injunctive relief, an additional reason why plaintiffs should presumptively be entitled to fees. 390 U.S. at 402. No such considerations are present here. The challenged policy had been abandoned long before current counsel entered the case, and thus there was no need to seek any injunctive relief.

the interests of its members as perhaps required by its duty of fair representation risking an almost automatic award of attorney's fees against the union if it does not prevail? Are innocent incumbent employees (or their unions acting on their behalf) who in remedial proceedings raise the equities of their positions vis-a-vis plaintiffs who may have slept upon or settled questionable claims to be almost automatically assessed attorney's fees if their arguments do not prevail? We think the answer to these questions must be no; but whatever the answer, those unions and employees are entitled to know it. (At the moment the answer varies depending upon the judicial circuit in which the case is brought). Before they embark upon a course of conduct, those unions and employees should know whether they can afford to voice their rights. Accordingly, there is a compelling need for this Court to grant *certiorari* and decide the question presented.

II. As Both The Majority And Dissent Below Expressly Noted, A Conflict Of Authority Exists Among The Courts Of Appeals

In *Reeves*, the plaintiffs were black sheriffs who brought suit against a county government pursuant to 42 U.S.C. § 1981 and 1983. The suit was settled through a court-approved decree. White deputy sheriffs subsequently intervened and contended (unsuccessfully) that the consent decree violated their rights. When fees were sought against the intervenors (pursuant to 42 U.S.C. § 1988),[12] the Eleventh Circuit said:

[12] In 1976, 42 U.S.C. § 1988 was enacted to allow attorneys' fee awards in cases under the Civil Rights Act of 1871. The language of Section 1988—which is the provision at issue in *Reeves* and *Charles, infra*, is virtually identical to the language of § 706(k) of Title VII and § 204(b) of Title II. It frequently has been said that Section 1988 was patterned after its Title II and Title VII counterparts and should be interpreted in an identical fashion. *Hanrahan v. Hampton*, 446 U.S. 754, 758, n.4 (1980); *Hensley v. Eckerhart*,

In the present case, the intervenors claimed that the consent decree's quota provision violated their constitutional rights. Furthermore, it is undisputed that the intervenors were not responsible for any of the alleged violations that led to the consent decree or that they had ever violated the constitutional rights of any of the members of the plaintiff class. Therefore, we agree with the district court that the intervenors should be characterized as plaintiffs and are liable for attorney's fees only if their claims were frivolous. 791 F.2d at 1484.

The Panel majority in this case flatly rejected the *Reeves* holding:

IFFA would have us characterize its posture in this case precisely as the Eleventh Circuit characterized the intervenors' position in *Reeves*. We decline to do so. Acceptance of a "functional plaintiff" exception to the rule favoring fees awards to prevailing Title VII plaintiffs, in our view, unnecessarily threatens to undermine what has come to be interpreted as a deliberate statutory presumption in favor of such awards to prevailing parties. (Pet. App. 11a).[13]

The Panel majority did not explain, however, why it felt plaintiffs should be presumptively entitled to fees

461 U.S. 424, 433, n.7 (1983). Certainly there is no question that the Seventh Circuit sees no distinction between § 1988 and § 706(k). (Pet. App. 7a).

[13] One day before its decision issued in this case, the same Seventh Circuit Panel, by the same 2-1 vote, affirmed an award of fees against intervenors in *Charles v. Daley*, 846 F.2d 1057 (7th Cir. 1988). "*Charles* involved an award of attorneys' fees pursuant to section 1988 against three private parties who intervened on the side of Illinois in a suit challenging the constitutionality of the State's criminal abortion statute" (Pet. App. 6a-7a). Rehearing was sought and denied on July 22, 1988, the same day on which rehearing was denied in *this* case (although no judges voted to grant rehearing in *Charles*). The facts of the two cases, while quite different, demonstrate the broad range of individuals and entities affected by the issue presented. (We understand that certiorari will be sought in *Charles*).

when the party from whom fees are sought is not the party who violated the law. It did, however, choose to reemphasize its disagreement with the Eleventh Circuit:

Of even greater concern, however, is our belief that were we to adopt the "functional plaintiff" approach articulated in *Reeves* and advocated by IFFA, we might very well encourage intervenors, and ultimately defendants, in Title VII lawsuits to manufacture constitutionally-derived or statutorily-based defenses in an attempt to cloak themselves in the protective guise of functional plaintiffs, in effect rendering them immune from statutory fee liability except where their defenses are held to be completely without merit. (Pet. App. 13a).

The dissent below disagreed:

[T]he application of the *Christianburg Garment* policies warrants treating the intervenors as plaintiffs for attorneys' fees purposes. *See Reeves v. Harrell*, 791 F.2d 1481, 1484 (11th Cir. 1986), *cert. denied*, 107 S.Ct. 880 (1987).

(Pet. App. 20a).

Given the acknowledged split of authority on an issue of obvious importance to many, we submit that *certiorari* should be granted and the issue resolved by this Court.

III. The Case Law From The Other Circuits Only Adds To The Uncertainty

While no other Court of Appeals has faced the issue presented here as directly as the Eleventh and Seventh Circuits, several have at least touched upon it. A reading of those cases only serves to reinforce the need for this Court to decide the issue. Simply put, the state of the law is unsettled and confused. Decisions from the District of Columbia, Second, Third, and Ninth Circuits lend support to the position of the Eleventh Circuit (and the Seventh Circuit dissent), while decisions of the Fifth and Sixth Circuits arguably give some solace to the Panel majority below.

A. District of Columbia Circuit

The Panel majority acknowledged that *Grano v. Barry*, 783 F.2d 1104, 1112 (D.C. Cir. 1986) lends support to the position taken by IFFA and the Eleventh Circuit. (Pet. App. 10a). In *Grano*, the court affirmed the district court's refusal to award fees under § 1988 against intervenors on the "functional plaintiff" theory, saying such a ruling was within the discretion of the district court, and citing *Kirkland v. New York State Department of Correctional Services*, 524 F.Supp. 1214 (S.D.N.Y. 1981), an early and eloquent opinion holding that unsuccessful intervenors should not be treated as wrongdoer defendants for attorney's fees purposes.

The D.C. Circuit in *Grano* also cited *Sierra Club v. EPA*, 769 F.2d 796 (D.C. Cir. 1985), a case involving a request for an award of fees against an intervenor under § 307(f) of the Clean Air Act, 42 U.S.C. § 7607 (f). In *Sierra Club* the court refused to award fees against intervenors whose claims were not frivolous and whose position was intended to encourage the "effe tive interpretation and implementation of the Act." 769 F.2d at 810-11. The court took the same position regarding a claim for fees against intervenors pursuant to § 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d), in *National Resource Defense Council, Inc. v. Thomas*, 801 F.2d 457 (D.C. Cir. 1986) (Scalia, J.). While the Panel majority below distinguished *Thomas* on the basis of slightly different statutory phraseology (Pet. App. 8a, n.5), that distinction is quite dubious since this Court has made it clear that § 304(d) of the Clean Air Act (which is substantially identical to the provisions at issue in *Thomas* and *Sierra Club*) should be interpreted in the same fashion as § 1988 (which is substantially identical to § 706(k)). *Pennsylvania v. Delaware Valley Citizens Council*, 478 U.S. 546, 106 S.Ct. 3088, 3095 (1986); *Pennsylvania v. Delaware Valley Citizens Council*, —— U.S. ——, 107 S.Ct. 3078, 3080, n.1; *see* also *Hanrahan v. Hampton*, 446 U.S. 754, 758, n.4 (1980).

The purposes behind these statutes are "nearly identical", and there is a common thread: fees are to be awarded against those who have violated the law. Moreover, those who advance the interests of innocent third parties affected by the resolution of discrimination cases clearly have "reasonably attempted to advance the implementation of the Act." *Thomas*, 801 F.2d at 467.[14] Accordingly, it is quite difficult to reconcile *Thomas* and *Sierra Club* with the result below.

B. Second and Third Circuits

The Second Circuit decision in *Annunziato v. The Gan, Inc.*, 744 F.2d 244 (2nd Cir. 1984) is also inconsistent with the result below, as pointed out by the dissent in *Charles v. Daley*, 846 F.2d 1057, 1078 (7th Cir. 1988). In *The Gan*, the third-party against whom fees were sought had purchased a building from a city government. Plaintiffs brought suit against the city and the purchaser under 42 U.S.C. § 1983, and after settlement sought fees under § 1988. The court refused to award fees against a party who had not been shown to have violated the law:

> The policy of awarding fees, which is to encourage civil rights plaintiffs to bring actions to vindicate their constitutional rights, was furthered in this case by the district court's award of fees against the City. We do not view this policy of encouragement as applicable to The Gan. It was an innocent third party caught in the cross-fire between plaintiffs and the City of New Haven over a municipal practice in which The Gan had no hand.
>
> (744 F.2d at 253).

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[14] The Panel majority below cited in support of its position *Moten v. Bricklayers*, 543 F.2d 224 (D.C. Cir. 1976). (Pet. App. 7a). However, *Moten* is a pre-*Christiansburg Garment* decision where fees were assessed against an employer association for filing an appeal when it had never even sought leave to intervene at the district court. (*Id.* at 227 and 239). Accordingly, an award of fees would likely have been justified in *Moten* regardless of what standard was applied.

A case with somewhat similar facts is *Tunstall v. Office of Judicial Support*, 820 F.2d 631 (3rd Cir. 1987). In *Tunstall*, the Third Circuit, relying on *The Gan*, refused to award fees under § 1988 against a party who had purchased plaintiffs' home from the city, but played no role in the city's allegedly unlawful acts.[15]

C. Ninth Circuit

As the Panel majority below also acknowledged (Pet. App. 15a), the Ninth Circuit decision in *Richardson v. Alaska Airlines, Inc.*, 750 F.2d 763 (9th Cir. 1984), lends support to IFFA's position. There, a pilot had sued an airline claiming illegal discrimination in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.* The union intervened claiming that a settlement and entry of a proposed consent decree would violate the seniority rights of its members pursuant to its collective bargaining agreement with the airline. The union's contentions were not accepted. However, the court refused to award fees against the union because the "policy considerations which underlie the shifting" of attorney's fees did not apply against a party who had not violated the law. 750 F.2d at 766. The court also, in a passage quite applicable to this case, noted that the union was merely fulfilling its duty of fair representation to its members:

> *Imposing a fee award would only punish ALPA for performing an act it was under a duty to do.* Under the National Labor Relations Act, 29 U.S.C. § 151 et seq. (1982) and the Railway Labor Act, 45 U.S.C. § 151 et seq. (1982), unions are given the right to act as exclusive representatives for all members in the bargaining unit. This right carries with it a corresponding duty to represent all members fairly. Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192, 202-03, 65 S.Ct. 226, 232, 89 L.Ed. 173 (1944).

(750 F.2d at 766, emphasis supplied).[16]

D. Sixth Circuit

The Sixth Circuit affirmed an award of fees against an intervenor in *Haycraft v. Hollenbach*, 606 F.2d 128 (6th Cir. 1979), a case relied upon by the District Court here (Pet. App. 33a) and by the Panel majority in *Charles*, 846 F.2d at 1068-9.

The intervenor in *Haycraft* was not a party involved in the litigation, but merely a county judge who wanted to provide his own personal plan for solving the area's school desegregation problems. Fees were awarded pursuant to § 718 of the Emergency School Act of 1972, 20 U.S.C. § 1617 (since repealed), which was textually similar to § 706(k) and § 1988.[17]

E. Fifth Circuit

The Panel majority also relied upon *U.S. v. Terminal Transport Co., Inc.*, 653 F.2d 1016 (5th Cir., Aug. 12, 1981), *cert. denied*, 455 U.S. 989 (1982)). In that case the district court had found both employer and union defendants in violation of Title VII. Following the issuance of *Teamsters v. U.S.*, 431 U.S. 324 (1977), that order was modified (in compliance with *Teamsters*) to hold that the unions were not in violation of Title VII

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[15] It does not weaken our case to note that there was a dissent in *The Gan*. It only serves to demonstrate (once again) the need for guidance from a higher authority.

[16] The Panel majority accurately pointed out that the statute under which *Richardson* was decided provides an alternative basis for the result there. *See* 29 U.S.C. § 216(b). Nonetheless, we must note that the Ninth and Seventh Circuits' views are diametrically opposed in regard to the actions undertaken and obligations owed by the respective unions as well as the consequences of those actions and obligations for attorney's fees purposes.

[17] We believe *Haycraft* can be distinguished on the basis that the court found intervenor's conduct to be in bad faith, which would have justified an award of fees even if the intervenor were judged as a plaintiff for attorney's fees purposes. *See* 606 F.2d at 133.

and not liable for backpay. The Fifth Circuit nonetheless found the unions liable under § 706(k) for some of plaintiffs' attorney's fees due to the union's opposition to seniority relief sought by plaintiffs.[18] The opinion cites *Christiansburg Garment* but contains no discussion of its principles.[19]

IV. The Result Below Is In Conflict With Decisions Of This Court

Even beyond the confused state of the lower court case law, the opinion of the Panel majority below cannot be reconciled with the principles articulated by this Court in *Christiansburg Garment,* or with the thrust of several Supreme Court opinions which deal with the rights of innocent, affected third parties. See p. 12, *supra.* We offer but one more example. Just months after its issuance, *Zipes* was cited by the Court in *General Building Contractors Association, Inc. v. Pennsylvania,* 458 U.S. 375 (1982). There the Court held that an employer association which had not participated in discrimination by a union in the operation of an exclusive hiring hall could not be required to share the cost of a remedial program. However, Justice Rehnquist said:

> This is not to say that defendants in the position of petitioners might not, upon an appropriate evidentiary showing, be retained in the lawsuit and even subjected to such minor and ancillary provisions of an injunctive order as the District Court might find necessary to grant complete relief to respondents

[18] *Terminal Transport,* however, was obviously not treated as precedent in *Reeves.* The Eleventh Circuit is bound to follow all Fifth Circuit decisions which issued before October 1, 1981, which would include *Terminal Transport. Bonner v. Prichard,* 661 F.2d 1206 (11th Cir. 1981). Indeed, Judge Clark was on the panel in both *Reeves* and *Terminal Transport.*

[19] The district court case law in this area is also divergent. For a discussion of those cases, *see* Price, *Protecting Defendant-Intervenors From Attorneys' Fee Liability in Civil Rights Cases,* 23 Harv.J. on Legis. 579 (1986).

> from the discrimination they suffered at the hands of the Union. *See Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385 (1982). But that sort of minor and ancillary relief is not the same, and cannot be the same, as that awarded against a party found to have infringed the statutory rights of persons in the position of respondents.
>
> * * * *
>
> Absent a supportable finding of liability, we see no basis for requiring the employers or the associations to aid either in paying for the cost of the remedial program as a whole or in establishing and administering the training program. 458 U.S. at 399-400.

Although "costs" of a remedial program may not precisely translate into "costs" under § 706(k), the analogy is striking. Clearly, a sharp line is to be drawn between those who violate the law and those caught in the middle between victim and discriminator. Being held liable for attorney's fees under the same standard applied to defendants who violate the law is hardly "minor" or "ancillary". We cannot believe that the large objectives of Title VII require that innocent employees carry such a heavy burden. *Ford Motor Co. v. EEOC,* 458 U.S. at 240.

V. Guidance Is Needed From This Court On The Question Presented, And This Case Presents The Ideal Opportunity For The Court To Clarify The Law

As is obvious from the foregoing, the question presented needs to be decided by this Court. The issue is important, the lower courts are badly divided, the scope of persons affected is immense (e.g., contrast IFFA with the third-parties against whom fees were sought in *Charles, Haycraft, Reeves* and *The Gan*), and the issue will unquestionably continue to arise until the Court provides direction. Moreover, we submit that *this case* is the perfect case for the Court to give that direction. Consider the exceptional confluence of factors:

1. *IFFA had an actual interest in the litigation.* In contrast with some of the cases on this issue (e.g., *Haycraft, Sierra Club,* and *Charles*), IFFA and its members had a direct, discernible interest in the matters at issue and were asserting *their own rights.* IFFA was not protecting the environment in general or voluntarily assisting in the defense of a state statute. Thus, the "chilling effect" of the result below is directly in focus.

2. *The Seventh Circuit told the union to do what it did.* IFFA was acting on the heels of the Seventh Circuit's 1973 pronouncement that the union was legally obliged to represent incumbents who might be affected by the resolution of the litigation. How could the union have done otherwise?

3. *IFFA was only fulfilling its duty of fair representation.* By acting in response to the Seventh Circuit's warning in a vain attempt to enforce its contract and safeguard its members' job security, IFFA was only complying with its duty of fair representation to its members, as the Ninth Circuit in *Richardson* and the dissent below suggest. It takes little ingenuity to imagine that if IFFA had simply refused to represent the interests of those whose jobs were in jeopardy, those flight attendants might have sued IFFA. Under the result below unions will indeed be punished merely for performing their legal obligations.

4. *The union filed this suit.* The actions of IFFA's predecessor made it possible for this suit to be filed, for TWA's illegal policy to be eliminated, for Plaintiffs to regain their jobs, and for Plaintiffs' current counsel to earn their million-dollar-plus fees. If these facts do not constitute "special circumstances" which should insulate IFFA from fee liability, it is difficult to imagine any which would. *Christiansburg Garment,* 434 U.S. at 418.

5. *The law changed dramatically during this litigation and IFFA had an eminently reasonable basis for going forward.* The statement in *Christiansburg Garment* that the "course of litigation is rarely predictable" (434 U.S. at 422) is an understatement when applied to this case. The very substantial nature of the questions raised by IFFA are well documented by this Court's prior grant of *certiorari,* the dissent below, the four Circuit Judges who voted to grant rehearing, and the Eleventh Circuit opinion that accepts IFFA's position in its entirety.

6. *Before IFFA intervened, Plaintiffs' counsel was already in a position to exact enormous fees from the settlement fund.* Thus, awarding more fees is hardly necessary in order to further the general goal of encouraging plaintiffs of limited means to bring suit. It will merely provide an additional bonanza for counsel here.

7. *As the dissent noted, IFFA intervened only "to protect its members' jobs."* (Pet. App. 18a). It is difficult to believe that such action should subject IFFA to an award of fees as if IFFA had violated the law.

In short, if any intervenor or third-party deserves to be judged by a standard for attorney's fees liability different from the standard applied to defendants found guilty of illegal discrimination, it is this one. Accordingly, this is the ideal case for the Court to determine if any different standard should be applied.

CONCLUSION

The writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 86-2731

ANNE B. ZIPES, *et al.*,
Plaintiffs-Appellees,
v.

TRANS WORLD AIRLINES, INC., *et al.*,
Defendants,
and

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Intervenor-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Western Division
No. 74 C 2063—Stanley J. Roszkowski, *Judge*

ARGUED APRIL 23, 1987—DECIDED MAY 6, 1988

Before CUMMINGS, COFFEY, and MANION, *Circuit Judges.*

COFFEY, *Circuit Judge.* This dispute over liability for statutory attorneys' fees has its origins in a 1970 class action filed by the plaintiffs against Trans World Airlines ("TWA") alleging unlawful sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42

U.S.C. § 2000e *et seq.* After nearly nine years of litigation, the plaintiffs entered into a comprehensive settlement agreement with TWA which was contested by the intervenor, the Independent Federation of Flight Attendants ("IFFA"), on the grounds that the terms of the settlement violated the rights of those TWA flight attendants not members of the plaintiff class. IFFA's opposition to the settlement agreement consumed three years of litigation culminating in 1982 when the plaintiff class prevailed before the Supreme Court. Subsequently pursuant to section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), plaintiffs' attorneys successfully petitioned the district court for fees incurred in connection with their post-settlement legal work. We affirm the district court's award of post-settlement fees against IFFA as well as its use of a multiplier in calculating that award.

I. FACTS

The proceedings which pre-date this lawsuit are summarized in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). The plaintiffs brought this class action against TWA back in 1970, challenging the airline's policy of automatically terminating the employment of all female flight attendants who became mothers while permitting their male counterparts, new fathers, to continue flying.[1] Soon after the filing of suit by the plaintiffs, TWA abandoned its "no-motherhood" policy and IFFA's predecessor, then representing *both* the plaintiff class and unaffected flight attendants, entered into a settlement with TWA. Although the district court approved the proffered settlement, several disenchanted class members appealed. We reversed the district court's approval of the 1971 settlement based upon the conflict we perceived between the then union's obligations to the plaintiff class

[1] Presumably, although it is not clear from the record, TWA actually terminated flight attendants upon learning of their pregnancy.

on the one hand and to the then-currently working flight attendants on the other. *Air Line Stewards and Stewardesses Association v. American Airlines*, 490 F.2d 636 (7th Cir. 1973). We ordered IFFA's predecessor to be replaced as the class representative.

Following reinstatement of the lawsuit, the district court granted the plaintiffs' motion for summary judgment, concluding that TWA's "no-motherhood" policy violated Title VII's proscription against discrimination in employment on the basis of sex. We affirmed the district court's finding of unlawful employment discrimination but held that the claims of a number of the members of the class were barred because charges had not been timely filed with the Equal Employment Opportunity Commission ("EEOC"). *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142 (7th Cir. 1978). Our holding on the timeliness issue necessitated that we divide the plaintiff class into two groups —Sub Class A, class members whose EEOC charges were timely, and Sub Class B, those whose charges were untimely—and that we remand the case with respect to the timely claims of Sub Class A.

Prior to any action in the district court in response to our remand, the parties reached a settlement which provided, *inter alia*, that TWA establish a $3,000,000 settlement fund to benefit all class members and that each class member be credited with full company and union seniority from the date of her termination by the airline. IFFA, the union certified to act as the collective-bargaining agent both for those TWA flight attendants not affected by the airline's discontinued "no-motherhood" policy and for flight attendants hired since the termination of the plaintiffs, sought and received permission to intervene in the lawsuit to object to the settlement. Specifically, IFFA opposed the proposed settlement on two grounds: first, that the untimely filing of charges with

the EEOC by members of Sub Class B left the district court without jurisdiction to consider equitable relief affecting them, and second, that reinstatement of the plaintiffs with full retroactive "competitive" seniority[2] would violate the collective bargaining agreement then in place between TWA and the union's incumbent members. After three days of hearings, during which time IFFA had an opportunity to air its objections, the district court approved the settlement agreement and expressly found that "full restoration of retroactive seniority will not have an unusual adverse impact upon currently employed flight attendants in a manner which is not typical of other Title VII cases . . . ." (Mem. Op., November 8, 1979 at 2.)

IFFA appealed, arguing that in light of this court's earlier decision that the timely filing of an EEOC charge was a jurisdictional prerequisite, the district court erred in holding that it retained jurisdiction to approve the settlement agreement with respect to Sub Class B. Once again, we ruled in favor of the plaintiffs and affirmed the district court, reasoning that "the principles favoring settlement of class action lawsuits remain the same regardless of whether the disputed legal issues center on the jurisdiction of the court over the action." *Air Line Stewards and Stewardesses Assn. v. Trans World Airlines, Inc.*, 630 F.2d 1164, 1169 (7th Cir. 1980). We also affirmed use of the remedy of retroactive competitive seniority for eligible class members; in our view the settlement responded appropriately both to TWA's past acts of discrimination as well as to the tangible consequences of those past acts. *Id.*

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[2] Ordinarily, "seniority" determines an employees' entitlement to benefits earned under an employment contract. "Competitive seniority," on the other hand, is used to allocate entitlements to benefits *among competing employees*; for example, shift assignments; prerogative in scheduling vacation; training opportunities; etc.

IFFA filed a petition for certiorari. The Supreme Court granted the petition and consolidated it with an earlier petition filed by the plaintiffs, consideration of which the Court had deferred in light of the then-ongoing settlement negotiations between the plaintiffs and TWA. The plaintiffs had sought review of our prior decision holding that timely filing of EEOC charges constituted a jurisdictional prerequisite which barred the claims of Sub Class B. IFFA, on the other hand, petitioned for review of our ruling that the terms of the settlement agreement—the reinstatement of discharged flight attendants with retroactive competitive seniority—did not impermissibly infringe upon the collectively-bargained for rights of incumbent flight attendants. In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), the Court held that we had been mistaken in construing the filing requirement of Title VII, Section 2000e-5(e), as being jurisdictional but agreed that reinstatement of the plaintiffs with full retroactive competitive seniority was a remedy both authorized by Title VII and appropriate in these circumstances.

Having been twice vindicated in the Supreme Court, plaintiffs' attorneys petitioned the district court for an award of fees against IFFA for their successful defense of the settlement agreement. In turn, the district court assessed IFFA $57,258 as fees for counsel for Sub Class A and $171,747 (comprised of a "lodestar" figure of $85,873.50 increased by a multipler of 2) as fees for counsel for Sub Class B. *Air Line Stewards v. Trans World Airlines, Inc.*, 640 F. Supp. 861 (N.D. Ill. 1986). Subsequently, upon motion, the district court lowered the multiplier used to compute the fees for Sub Class B from 2 to 1.44, yielding an award to counsel of $123,657.84. IFFA's total liability for fees incurred solely as a result of its challenge to the settlement agreement thus currently stands at $180, 915.84.

II. DISCUSSION

On appeal, IFFA asserts that the fee-shifting provision of Title VII, section 706(k),[3] does not authorize an award of attorneys' fees against an intervening party which has not been accused of a violation of federal law and which, in an effort to protect the rights of its members, raises arguments analogous to those a plaintiff would ordinarily make. Alternatively, in the event we disagree with its interpretation of section 706(k), IFFA points to certain "special circumstances" which it claims render an award of fees inappropriate. Finally, IFFA argues that even if the district court's decision to award fees is upheld, the use of a multiplier to increase the amount of the award to counsel for Sub Class B was improper. We consider these arguments in turn.

A. Liability of "Innocent" Intervening Parties

In *Charles v. Daley*, Nos. 86-1552 and 86-3137, slip op. (7th Cir. May 5, 1988), we addressed the question whether an "innocent" third party intervenor-defendant can be held liable for the attorneys' fees incurred by a prevailing party under the Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. § 1988.[4] *Charles* involved an award of attorneys' fees pursuant to section 1988 against three private parties who intervened on the side of Illinois in a suit challenging the constitutionality of the

[3] Section 706(k), 42 U.S.C. § 2000e-5(k) provides in relevant part:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the [Equal Opportunity Employment] Commission or the United States, a reasonable attorney's fee as part of the costs . . . .

[4] Section 1988 states in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

State's criminal abortion statute. In finding against the intervening defendants and in favor of the prevailing plaintiffs in *Charles*, we held, that although the language of section 1988 does not explicitly enumerate those against whom an award of fees may be imposed, the overriding purpose of the statute—to encourage the vindication of civil rights by 'private attorneys general'—would be furthered by interpreting section 1988 to include fee awards against unsuccessful intervening defendants, regardless of whether the intervenor could actually be found to be a violator of federal law under 42 U.S.C. § 1983. *Id.* at 12-13; *see also Akron Center for Reproductive Health v. City of Akron*, 604 F. Supp. 1268 (N.D. Ohio 1984) (Section 1988 fees awarded in part against private intervenors who joined City of Akron in defending constitutionality of local abortion ordinance). We are unpersuaded that the facts of the instant case require us to adopt a different rule under Title VII: not only is the operative language of section 706(k) virtually identical to that used in section 1988, but the Supreme Court has previously observed that in considering awards of attorneys' fees, courts should consult related attorneys' fees statutes and case law. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983); *see also Zabkowicz v. West Bend Co.*, 789 F.2d 540, 549 n.9 (7th Cir. 1986). Moreover, other circuits applying Title VII's fee award provision have construed the statute to allow fee awards against "innocent" defendants and intervenors. *See e.g., Allen v. Terminal Transport Co., Inc.*, 486 F. Supp. 1195, 1202 (N.D. Ga. 1980) (union defendant guilty of no discrimination held partially liable for Title VII attorneys' fees due to opposition to consent decree affecting its members), *aff'd*, 653 F.2d 1016 (5th Cir. 1981); *Moten v. Bricklayers, Masons and Plasterers*, 543 F.2d 224 (D.C. Cir. 1976) (business association seeking unsuccessfully to intervene in appeal of a Title VII lawsuit assessed fees despite having engaged in no

unlawful activity); *Thompson v. Sawyer*, 586 F. Supp. 635 (D. D.C. 1984) (Title VII attorneys' fees imposed against non-party union for unsuccessful attempts at intervention to challenge relief attained by plaintiffs).[5]

IFFA raises a related argument which proceeds from the premise that, because its role in opposing the settlement agreement was more closely analogous to that of a plaintiff than to that of a defendant, it should be held liable for fees only if its intervention in the lawsuit can

[5] IFFA cites *Richardson v. Alaska Airlines*, 750 F.2d 763 (9th Cir. 1984), in support of its contention that only those found to be violators of federal law may be held liable for statutory attorneys' fees. *Richardson*, however, is clearly distinguishable from the case at bar. In *Richardson*, a pilots' union intervened unsuccessfully in a lawsuit brought under the Age Discrimination in Employment Act ("ADEA") to contest the fairness of a consent decree reached in the underlying litigation. The decree was ultimately approved by the district court and Richardson, the prevailing party in the original ADEA action, petitioned the court for statutory attorneys' fees against the union. Both the district court and, on appeal, the Ninth Circuit rejected Richardson's petition for fees but *not*, as IFFA would have us believe, because the union itself was innocent of any violation of federal law. Instead, Richardson was denied fees because the pertinent provision of the ADEA, 29 U.S.C. § 626(b), provides for an award of fees *only* against an offending "employer." There is, of course, no such limiting language respecting those against whom fees may be imposed in section 706(k) of Title VII; thus, we are in no way precluded by *Richardson* from imposing fees against IFFA here.

Similarly, IFFA points to *Natural Resources Defense Council, Inc. v. Thomas*, 801 F.2d 457 (D.C. Cir. 1986) (Scalia, J.), in which the District of Columbia Circuit refused to award attorneys' fees, pursuant to the attorney fee provision of the Clean Water Act, 33 U.S.C. § 1365(d), against an intervenor guilty of no violation of federal law. In affirming the district court's denial of fees against the intervenor in *Thomas*, the court specifically noted that the statutory language employed in section 1365(d) was neither textually similar to the language of 42 U.S.C. § 1988 (and by extension section 706(k) of Title VII) nor susceptible to the same pro-prevailing party interpretation that courts have accorded section 1988. *Id.* 801 F.2d at 461 n.3.

be deemed frivolous or unreasonable. The district court rejected the intervenor's "functional plaintiff" argument and we concur.

It is settled law that a prevailing Title VII plaintiff is presumptively entitled to fees. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Zabkowicz*, 789 F.2d at 548. However, in *Christianburg Garment Co. v. E.E.O.C.*, 434 U.S. 412 (1978), the Supreme Court held that a more rigorous standard of eligibility applies when prevailing Title VII defendants seek to recover fees from unsuccessful plaintiffs. Specifically, the Court held that prevailing defendants are entitled to an award of fees only upon a finding that the plaintiff's action was "frivolous, unreasonable or without foundation." *Id.* at 421. While the Supreme Court has never explicitly considered the standard applicable to a request for an award of fees against an unsuccessful intervenor, IFFA urges that because it intervened solely to assert the rights of its non-discriminating incumbent members, it should be viewed, in practical terms, as a plaintiff, and hence assessed attorneys' fees only if its opposition to the settlement was found to have been groundless.[6] In the instant case, the district court made no such finding.

The most recent exposition of IFFA's "functional plaintiff" argument appears to have been made in *Reeves v. Harrell*, 791 F.2d 1481 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 880 (1987). In *Reeves*, a case apparently not brought to the district court's attention, white police officers intervened to challenge the constitutionality of a consent decree entered into by black police officers and the Sheriff's Office of Bibb County, Georgia. The black officers brought suit against the Sheriff's Office alleging racial discrimination in job assignments and promotions in violation of 42 U.S.C. §§ 1981 and 1983. The intervenors ar-

[6] In *Charles v. Daley*, Nos. 86-1552 and 86-3137, slip op. (7th Cir. May 5, 1988) we explicitly declined to consider such an argument because it had been raised only in an *amicus* brief.

gued that the terms of the consent decree, which called for promotion of black officers on an equal basis with white officers, would in turn discriminate against them on the basis of race. Although the plaintiffs ultimately prevailed over the intervenors' challenge to the consent decree, the Eleventh Circuit's decision on the issue of section 1988 fees expressly recognized the importance of the countervailing constitutional claims raised by the intervening white officers. Indeed, the court found the role of the intervenors in *Reeves* to be the functional equivalent to that of plaintiffs.[7] In so holding, the court suggested that such a result was required if defendants with good faith constitutional claims of their own were not to be deterred from litigating them for fear of statutory fee liability.[8] *Id.* at 1484; *see also Grano v. Barry*, 783 F.2d 1104, 1112 (D.C. Cir. 1986); *Kirkland v. New York State Department of Correctional Services*, 574 F. Supp. 1214, 1219 (S.D.N.Y. 1981) ("[F]orcing intervenors to bring their constitutional claims only at the risk of becoming liable for their opponents' fees if they do not prevail may substantially deter such intervention . . ."),

[7] In the legislative colloquy preceding passage of 42 U.S.C. § 1988, Congress specifically recognized that the vindication of civil rights need not always be the task of a plaintiff: "In the large majority of cases the party or parties seeking to enforce such rights will be the plaintiff and/or plaintiff-intervenors. However, in the procedural posture of some cases, the parties seeking to enforce such rights may be the defendants or defendant-intervenors." S. Rep. No. 1011, 94th Cong., 2d Sess. at 4 n.4. While thus cognizant of the fact that defendants, too, may be in a position to assert important constitutional and statutory rights, nothing in section 1988's legislative history contradicts its plain language or suggests that any factor other than a party's success should be determinative of entitlement to or, conversely, liability for fees.

[8] Although the Eleventh Circuit found the intervenors to be functionally equivalent to plaintiffs for purposes of liability for Title VII attorneys' fees, the court found their intervention to have been untimely and thus, in the end, susceptible to the imposition of fee liability under *Christianburg*.

aff'd in part, rev'd in part on other grounds, 520 F.2d 420 (2nd Cir. 1975). IFFA would have us characterize its posture in this case precisely as the Eleventh Circuit characterized the intervenors' position in *Reeves*. We decline to do so. Acceptance of a "functional plaintiff" exception to the rule favoring fee awards to prevailing Title VII plaintiffs, in our view, unnecessarily threatens to undermine what has come to be interpreted as a deliberate statutory presumption in favor of such awards to prevailing parties.

One need only look to the plain language of section 706(k) to discover that Congress intended only one class of litigants, prevailing parties, be eligible to recover attorneys' fees expended in Title VII litigation. Conversely, nowhere does section 706(k) expressly exclude any class of litigants from liability for such awards. While we are not unmindful that a literal interpretation of section 706(k) may, from time to time, result in the imposition of a fee award against a party whose sole involvement in a Title VII lawsuit is limited to an assertion of countervailing constitutional rights (*i.e.*, the intervenors in *Reeves*), we are nonetheless bound to apply the fee award provision of Title VII as it *is* written, not as it might have been written. *See e.g. United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 543 (1940) (plain meaning of statute must be given effect unless doing so would result in "absurd" or "futile" results or results so unreasonable as to be plainly at variance with the policy of the legislation as a whole). Section 706(k) unequivocally endorses fee awards to prevailing Title VII parties; the plaintiffs in the case at bar prevailed and, consequently, are entitled to the fees awarded them by the district court.

IFFA contends that such narrow and syllogistic reasoning places undue importance upon the nominal alignment of the parties. For example, IFFA argues that had it waited until after approval of the settlement between

the plaintiffs and TWA and then filed a separate action of its own contesting the validity of the agreement, it could not have been held liable for the fees incurred in connection with even a successful defense of the settlement by either the plaintiff class or TWA. Thus, IFFA asserts that it could have escaped section 706(k) liability merely by deciding to file its own independent lawsuit, one which would not have identified the union's interests with those of TWA in the underlying litigation. Assuming for the moment that a subsequent suit by IFFA would not be barred as untimely,[9] the fact that such a procedural loophole exists in Title VII's statutory scheme constitutes a flaw that must be addressed to Congress, not to the federal courts. *Cf. Kennedy v. Whitehurst*, 690 F.2d 951, 953 (D.C. Cir. 1982) ("Arguments centering on the inequities caused by the absence of fee-shifting are properly addressed to the Congress and not to the courts."). The settlement phase of this case pitted the plaintiff class against intervening defendant IFFA; that IFFA now regrets having chosen to proceed as an intervenor does not relieve it from having to bear the financial consequences of that decision.[10]

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[9] In *Marino v. Ortiz*, 108 S. Ct. 586 (1988), the Supreme Court, by an equally divided panel, let stand a court of appeals decision affirming a district court's dismissal of a separate suit challenging a consent decree brought by nonparties to the underlying Title VII litigation. Failure by the nonparties to have joined the lawsuit earlier as either co-defendants or intervenors rendered their subsequent action attacking the consent decree an "impermissible collateral attack." *Marino v. Oritz*, 806 F.2d 1144, 1146 (2d Cir. 1986). It therefore remains unclear whether a subsequent collateral attack of a Title VII settlement by nonparties to the original lawsuit could be employed as a strategy by prospective intervenors to escape statutory fee liability.

[10] The dissent characterizes as "unjust" our decision to impose fee liability upon IFFA, which admittedly was in no way responsible for TWA's breach of Title VII. Moreover, the dissent asserts that "[d]enying fee awards against . . . intervenors will not signifi-

Of even greater concern, however, is our belief that were we to adopt the "functional plaintiff" approach articulated in *Reeves* and advocated by IFFA, we might very well encourage intervenors, and untimely defendants, in Title VII lawsuits to manufacture constitutionally-derived or statutorily-based defenses in an attempt to cloak themselves in the protective guise of functional plaintiffs, in effect rendering them immune from statutory fee liability except where their defenses are held to be completely without merit. *See Christianburg*, 434 U.S. at 421. Congress has authorized attorneys' fees awards in employment discrimination cases as an inducement to individuals—both lawyers and laymen alike—to bring lawsuits as private attorneys general and thereby aid in the enforcement of Title VII; acceptance by the courts of a "functional plaintiff" exception to Title VII fee liability could substantially undermine this crucial incentive to ordinary citizens to enforce this Nation's civil rights laws in circumstances where the government simply cannot. We are not inclined to look favorably upon such a potentially injurious exception to this long-standing legislative scheme.

B. Special Circumstances

Despite the general rule that prevailing parties in Title VII litigation are presumptively entitled to attorneys' fees, the Supreme Court has held that fees may be withheld where certain narrowly defined "special circumstances" are present that would render an award of fees unjust. *Albemarle Paper Co.*, 422 U.S. at 415; *Christianburg*, 434 U.S. at 417. IFFA contends that two such

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cantly diminish plaintiffs' ability to attract counsel." The instant case, however, demonstrates the fallacy of the dissent's reasoning. Absent the possibility of recovering their attorneys' fees from IFFA, the prevailing plaintiffs would likely have been hardpressed to come up with sufficient funds to attract counsel willing to defend their settlement before the district court, this court and, finally, the Supreme Court.

"special circumstances" exist in the instant case. First, as the exclusive bargaining representative of its members, IFFA claims that it was obliged, under the judicially implied duty of fair representation, to intervene in the plaintiffs' Title VII lawsuit in an effort to set aside the parties' settlement agreement, which adversely affected the collectively-bargained for rights of its members. Such compulsory participation, argues IFFA, surely constitutes a special circumstance vitiating any liability for Title VII fees. In addition, IFFA posits as a second special circumstance the fact that the plaintiffs have already been awarded a generous and more than adequate sum—in excess of $1,250,000—as attorneys' fees in connection with the pre-settlement phase of this litigation and hence no further award of fees is necessary. We are persuaded that neither asserted "special circumstances" justifies withholding an award of fees to the plaintiffs and their counsel.

Initially, IFFA is mistaken when it claims that the duty of fair representation, first recognized by the Supreme Court in *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944), *required* it to join this lawsuit to contest the validity of the settlement agreement reached between the plaintiffs and TWA. *Steele*, a case arising under the Railway Labor Act, held that "when Congress empowered unions to bargain exclusively for all employees in a particular bargaining unit, and thereby subordinated individual interests to the interests of the unit as a whole, it imposed on unions a correlative duty inseparable from the power of representation to exercise that authority fairly." *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 46 (1979). A union must thus represent fairly the interests of all bargaining-unit members during the negotiation, administration and enforcement of collective-bargaining agreements. *Conley v. Gibson*, 355 U.S. 41, 46 (1957). In particular, a union breaches its duty of fair representation *only*

"when [its] conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith," as, for example, when it "arbitrarily ignore[s] a meritorious grievance or process[es] it in [a] perfunctory fashion." *Vaca v. Sipes*, 386 U.S. 171, 190-91 (1967); *Foust*, 442 U.S. at 47.

Notwithstanding IFFA's assertions to the contrary, the duty of fair representation does not and never has been construed to guarantee that an employee or bargaining unit has an absolute right to have a grievance or other action brought on its behalf, *see Vaca*, 386 U.S. at 191; *Graf v. Elgin, Joliet and Eastern Railway Co.*, 697 F.2d 771, 779 (7th Cir. 1983); *but see Richardson v. Alaska Airlines*, 750 F.2d 763 (9th Cir. 1984) (imposition of fee award against intervening union "would only punish it for performing an act it was under a duty to do"). In fact, in a conscious effort to minimize federal judicial intervention in labor disputes, unions have consistently been accorded considerable discretion in deciding whether and to what extent employee grievances should be prosecuted. *See Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38 (1953) ("A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents . . ."); *see also Rupe v. Spector Freight Systems, Inc.*, 679 F.2d 685, 691 (7th Cir. 1982); *Baker v. Armsted Industries, Inc.*, 656 F.2d 1245, 1250 (7th Cir. 1981); *Peterson v. Kennedy*, 771 F.2d 1244, 1253 (9th Cir. 1985); *Hart v. National Homes Corp.*, 668 F.2d 791, 794 n.4 (5th Cir. 1982); *N.L.R.B. v. American Postal Workers Union*, 618 F.2d 1249, 1255 (8th Cir. 1980). Rather than *requiring* the initiation and pursuit of employee grievances by labor unions, the duty of fair representation merely sets forth standards to be adhered to by unions in determining not to prosecute or appeal grievances brought to them by their members. *See N.L.R.B. v. Local 139, International Union of Operating Engineers*, 796 F.2d 985, 992-

93 (7th Cir. 1986); *United Independent Flight Officers v. United Airlines*, 756 F.2d 1274, 1281 (7th Cir. 1985). IFFA was thus in no way compelled to intervene in this lawsuit and, accordingly, its decision to so proceed does not constitute a "special circumstance" abrogating its fee liability under section 706(k).

IFFA's second posited "special circumstance" also fails to persuade us that the district court's award of fees to the plaintiffs was in any way inappropriate. The union argues that because plaintiffs' counsel received an "enormous" fee for their work performed in connection with the pre-settlement phase of this lawsuit, any additional award of fees for counsel's post-settlement legal work constitutes a windfall. Not only are objections here to the size of the district court's pre-settlement fee award belated, but that fee award is entirely irrelevant for purposes of evaluating the district court's post-settlement fee award. While fee-shifting statutes are not designed "as a form of economic relief to improve the financial lot of attorneys," *Pennsylvania v. Delaware Valley Citizens' Council*, 106 S. Ct. 3088, 3098 (1986), fee-shifting statutes are designed to reimburse plaintiffs for reasonable legal fees expended in certain types of lawsuits. IFFA has pointed to no errors in the district court's calculation of the plaintiffs' post-settlement fees (*i.e.*, number of attorney hours claimed or hourly rates sought); its only contention is that counsel were over-compensated by the district court's *earlier* award and thus any further award amounts to an abuse of discretion. The post-settlement proceedings in this case, directed at attacking the very essence of this lawsuit's successful and carefully crafted resolution, have already consumed in excess of two years of litigation and have included arguments before the district court, this court and the Supreme Court; accordingly, we find no abuse of discretion in the district court's decision to reimburse the plaintiffs fully for the fees they incurred during this important and procedurally separate phase of litigation.

C. Enhancement of the "lodestar" figure

After calculating the lodestar sum to which counsel for Sub Class B were entitled from IFFA, the district court, employing a multiplier of 1.44, adjusted its fee award upward by $37,984.65 to account for the delay in time between the filing of Sub Class B's post-settlement fee petition in May 1982 and the date of the court's actual fee award in September 1986. We have noted on at least two previous occasions that enhancement of a fee award to compensate counsel for the time-value of money (another way of saying delay in payment), while by no means mandatory, is certainly within a district court's discretion. *See Ohio Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646, 660 (7th Cir. 1985); *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 770 n.6 (7th Cir. 1982), *cert. denied*, 461 U.S. 956 (1983). Moreover, in *Pennsylvania v. Delaware Valley Citizens' Council*, 107 S. Ct. 3078 (1987), decided after oral argument in this case and holding that lodestar adjustments based upon the risk of nonpayment are inappropriate, the Supreme Court observed, "[W]e do not suggest, however, that adjustments for delay are inconsistent with the typical fee-shifting statute." *Id.* at 3082.

In the instant case, the district court, through independent research, determined that a long-term Treasury Note purchased at about the time of Sub Class B's fee petition would have yielded its purchaser approximately 7½% per year, representing a multiplier of 1.44. This multiplier was, in turn, used to augment the district court's basic lodestar figure. Although a strong presumption exists that at the time a fee petition is filed the lodestar figure represents the "reasonable" fee to which section 706(k) entitles prevailing parties, *see e.g. Pennsylvania v. Delaware Valley Citizens' Council*, 106 S. Ct. 3088, 3098 (1986), the pasage of time and the economic vicissitudes inherent therein are capable of eroding a fee award to such an extent that, in real terms, it no longer

represents a "reasonable" approximation of the value of the legal services intended to be compensated. It is for this very reason that courts frequently award prejudgment interest. Regardless of the method employed (use of a multiplier or an award of prejudgment interest), an equitable adjustment of the lodestar to offset a five year delay in payment does not, in the circumstances presented by this case, constitute an abuse of discretion.[11] *Delaware Valley*, 107 S. Ct. at 3082; *cf. Michaels v. Michaels*, 767 F.2d 1185, 1204 (7th Cir. 1985) ("[T]he decision to award prejudgment interest rates in the sound discretion of the district court."), *cert. denied*, 474 U.S. 1057 (1986). Accordingly, the district court's award of $123,657.84 against IFFA for post-settlement fees is upheld in its entirety.

III. CONCLUSION

We hold (i) that the district court acted properly in holding IFFA liable for statutory attorneys' fees under section 706(k) of Title VII and (ii) that the district court's use of a multiplier to enhance Sub Class B's fee award did not constitute an abuse of discretion.

AFFIRMED

MANION, *Circuit Judge*, dissenting. To protect its members' jobs, the IFFA intervened in this litigation and presented a substantial, good-faith challenge to the settlement between plaintiffs and TWA. When the IFFA's challenge ultimately proved unsuccessful, the district court awarded attorneys' fees to plaintiffs as "prevailing parties" against the IFFA under the same standard ap-

[11] *But see Library of Congress v. Shaw*, 106 S. Ct. 2957 (1986), wherein the Supreme Court held that, as distinct from a private defendant's liability for fees, the federal government's traditional immunity from an award of interest could not be circumvented by enhancing a lodestar to compensate for a delay in receiving payment. *Id.* at 2965.

plicable to defendants who have violated their employees' civil rights. The majority upholds this award. I respectfully dissent.[1]

In *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), the Supreme Court made clear that the standards under which § 706(k) fees are awarded must be assessed in light of the policies underlying that statute. Under § 706(k), a prevailing plaintiff is presumptively entitled to fees from a defendant held liable on the merits unless special circumstances would render awarding fees unjust. *Id.* at 416-17. A prevailing defendant, however, is not allowed to recover fees from a plaintiff unless "the plaintiff's action was frivolous, unreasonable, or without foundation . . . ." *Id.* at 421. The reason for this distinction is not contained in the statute's express language. The statute refers only to "prevailing parties." The Supreme Court, however, set forth three reasons for distinguishing between defendants and plaintiffs. First, § 706(k) sought to facilitate the enforcement of the civil rights laws through "private attorneys general." *Id.* at 416-18. Second, granting prevailing defendants attorneys' fees as a matter of course would act as a significant disincentive for plaintiffs to bring civil rights suits. *Id.* at 421-22. Third, "when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law." *Id.* at 418.

[1] In *Charles v. Daley*, Nos. 86-1552 and 86-3137, slip op. (7th Cir. May 5, 1988), this circuit recently held that under 42 U.S.C. § 1988 the plaintiffs were entitled to attorneys' fees as a "prevailing party" against intervening defendants who were not liable on the merits of plaintiffs' 42 U.S.C. § 1983 claims. I dissented in that case on the ground that the plaintiffs could not be deemed to have "prevailed" against defendants who were not liable to the plaintiffs on the merits. Likewise, I believe that § 706(k) should not have been applied in this case because plaintiffs did not obtain any relief on the merits against the intervening union on their Title VII claims. Because § 706(k) and 42 U.S.C. § 1988 have the same operative language concerning prevailing parties, however, *Charles* requires that plaintiffs be treated as prevailing parties against the IFFA.

In this case, the IFFA intervened to assert the federal collective bargaining rights of the incumbent employees. In addition, neither the IFFA nor the incumbent employees were in any way responsible for the "no-motherhood" policy that spawned the underlying litigation and ultimate settlement. In such a situation, the application of the *Christianburg Garment* policies warrants treating the intervenors as plaintiffs for attorneys' fees purposes. *See Reeves v. Harrell*, 791 F.2d 1481, 1484 (11th Cir. 1986), *cert. denied*, 107 S.Ct. 880 (1987). As there is no dispute that the IFFA presented a substantial, good-faith challenge to the settlement, the assessment of fees against it was inappropriate. Moreover, regardless of how the IFFA's posture in this litigation is characterized, the circumstances of this case render the award of fees unjust.

In the settlement negotiations between plaintiffs and TWA, neither side had a strong interest in protecting the jobs of TWA's incumbent employees. Plaintiffs obviously had a strong interest in regaining their old jobs. TWA's primary interest was in settling the lawsuit. TWA was going to have a full complement of flight attendants whether they came from the plaintiffs' or incumbent employees' ranks. While the IFFA may not have had a legal obligation to intervene, it certainly would have been unusual for the IFFA to simply ignore a settlement that substantially altered its contract with TWA and the job security of its members. In fact, this circuit dismissed the incumbent employees' predecessor union as the plaintiffs' class representative specifically because the union's interest in representing the collective bargaining rights of the incumbent employees conflicted with its position as class representative. See *Air Line Stewards and Stewardesses Ass'n, Local 550 v. American Airlines, Inc.*, 490 F.2d 636, 639-42 (7th Cir. 1973). The fact that the IFFA did what its members elected it to do and this circuit expected it to do, that is, represent the interests of incumbent employees, is not something that should subject it to Title VII attorneys' fees.

Moreover, the policy of encouraging "private attorneys general" to enforce Title VII does not warrant imposing fees against the IFFA. Section 706(k) seeks to encourage plaintiffs to bring suits against defendants who violate federal law. This policy has attenuated, if any, relevance to intervenors like the IFFA who did not violate Title VII. In addition, denying fee awards against such intervenors will not significantly diminish plaintiffs' ability to attract counsel. This is aptly demonstrated in the present case where plaintiffs' counsel has already received more than $1,250,000 from the $3,000,000 settlement.

Rather than encouraging persons to act as "private attorneys general," the majority's construction of § 706(k) will have quite the opposite effect. Title VII lawsuits often affect many employees other than the named plaintiffs. The settlement of a Title VII suit or the granting of remedies by a court may leave some employees in a less desirable employment position or out of a job altogether. Many of these affected employees will have substantial claims that the settlement or remedies violate their own rights under a collective bargaining agreement, Title VII, or even the Constitution. The just resolution of these cases requires the full participation of everyone involved. Mechanically assessing attorneys' fees against intervening employees who did not violate anybody's rights and who are not fortunate enough to posture themselves as "plaintiffs," will ensure that in many cases only two sides will be heard in a multi-sided dispute.

I would reverse the district court's award of attorneys' fees.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

July 22, 1988

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*

HON. JOHN L. COFFEY, *Circuit Judge*

HON. DANIEL A. MANION, *Circuit Judge*

No. 86-2731

ANNE B. ZIPES, *et al.*,
Plaintiffs-Appellees,

vs.

TRANS WORLD AIRLINES, *et al.*,
Defendants,
and

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Intervenor-Appellant.

Appeal from the United States District Court
for the Northern District of Indiana, Western Division

No. 74 C 2063—Stanley J. Roszkowski, *Judge*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by appellant, a vote of the active members of the Court was requested,* and a majority ** of the active members of the Court have voted to deny a rehearing *in banc*. A majority of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the foresaid petition for rehearing be, and the same is hereby, DENIED.

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* Judge Ripple did not participate in the consideration of the petition for rehearing *in banc*.

** Chief Judge Bauer, Judge Flaum, Judge Manion, and Judge Kanne voted to grant rehearing *in banc*.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 2071

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION,
LOCAL 500, TWU, AFL-CIO, *et al.*,
Plaintiffs,

vs.

TRANS WORLD AIRLINES, *et al.*,
Defendants.

No. 74 C 2063

ANNE B. ZIPES, *et al.*,
Plaintiffs,

vs.

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION,
LOCAL 550, TWU, AFL-CIO and
TRANS WORLD AIRLINES, INC.,
Defendants.

ORDER

Before the court are attorneys' fee petition by counsel for both Class A and B plaintiffs. Counsel for Class A plaintiffs seek $57,288 in fees from the Independent Federation of Flight Attendants ("IFFA"). Counsel for Class B plaintiffs seek $177,725 in fees [1] from the IFFA

[1] Including $5,978 in out-of-pocket expenses.

and $73,711.85 from defendant Trans World Airlines, Inc. ("TWA"). For the reasons stated herein, Class A plaintiffs' fee petition is granted in its entirety. IFFA is ordered to reimburse the settlement fund $57,258, the amount of Class A attorneys' fees. Class B plaintiffs' petition for fees is denied as to TWA and granted as to IFFA.

I. BACKGROUND

This extremely complex case was brought as a challenge to TWA's practice of routinely discharging pregnant stewardesses.[2] Sex discrimination charges were filed with the EEOC in June of 1970. The charges were filed by several TWA stewardesses who had fallen victim to TWA's discriminatory practice and by their former collective bargaining representative, the Air Line Stewards and Stewardesses Association ("ALSSA"). In August, 1970, after the EEOC proceedings were completed, this action was filed pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*[3]

The case was brought as a class action on behalf of (1) all stewardesses who had suffered a pregnancy-based firing after July 2, 1965 (the effective date of Title VII); and, (2) all then-employed stewardesses who might become pregnant. The named plaintiffs were ALSSA and the terminated stewardesses who had filed with the EEOC. The complaint sought reinstatement, retroactive seniority and backpay for those class members who had been fired and an injunction against future pregnancy-based firings for the then-employed stewardesses.

In October 1970, ALSSA entered into a collective bargaining agreement with TWA that eliminated future pregnancy-based discharges.

[2] American Airlines, Inc. had a similar practice and was at one time a defendant in this action. American's involvement in this case is irrelevant to the instant fee petition.

[3] Consolidated Case Number 70 C 2071.

In September of 1971, TWA and ALSSA reached an agreement designed to settle this case. The agreement provided that previously terminated stewardesses could return to work as openings occurred. The agreement abandoned the claims for retroactive seniority and backpay. Despite the objections of various class members, Judge Perry approved this settlement agreement on March 17, 1972.

The dissatisfied class members appealed entry of the settlement order and on September 11, 1973, the Seventh Circuit reversed the order. The Seventh Circuit remanded the case with instructions that "one or more of the named plaintiffs or other members of the class . . . replace ALSSA as the representatives of the class." *ALSSA v. American Airlines, Inc.*, 490 F.2d 636, 643 (7th Cir. 1973) *cert. denied*, 416 U.S. 993 (1974).

TWA and ALSSA had entered into another agreement during the pendency of the appeal. Under this agreement, TWA would rehire all class members except those who refused to relinquish their litigation rights, again without backpay or retroactive seniority. This agreement formed the basis for a second EEOC charge and later a suit against TWA and ALSSA.[4]

Following remand, proper class representatives were appointed and notice was sent to potential class members. In September, 1974, TWA sought leave to amend its answer to include a third affirmative defense. In this affirmative defense, TWA asserted that the majority of the class members' claims were barred since they had not filed charges with the EEOC within 90 days of their discharge.[5] While granting the amendment, Judge McLaren cautioned that TWA's delay in pleading the defense might well constitute a waiver.

[4] Consolidated Case Number 74 C 2063.

[5] At the time this case was filed, Title VII required charges to be filed with the EEOC within 90 days of the alleged unlawful employment practice. In 1972, this period was extended to 180 days. *See* 42 U.S.C. § 2000e-5(c).

On October 15, 1976, Judge McGarr denied TWA's motion to restrict the class to those stewardesses that had filed with the EEOC within 90 days of their discharge. While Judge McGarr agreed that the 90 day filing requirement was a jurisdictional prerequisite not subject to waiver, he held that any violation by TWA continued against all class members until the challenged policy was changed. Thus, the 90 day requirement was satisfied for all class members by the June 1970 EEOC charges.

On October 19, 1976, Judge McGarr granted the plaintiff class's motion for summary judgment as to liability.

At TWA's request, both the liability order and the earlier jurisdiction order were certified for immediate appeal. The Seventh Circuit allowed interlocutory review and subsequently affirmed the summary judgment as to TWA's Title VII liability. *In re Consolidated Pretrial Proceedings*, 582 F.2d 1142 (7th Cir. 1979). As to the jurisdictional issue, however, the Seventh Circuit declined "to extend the continuing violation theory . . . to include in the plaintiff class those employees who were permanently terminated more than 90 days before the filing of EEOC charges." *Id.* at 1149. The Seventh Circuit's ruling effectively barred the claims of approximately 92% of the plaintiff class. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 390 (1982).

The Seventh Circuit stayed its mandate pending the filing of petitions for certiorari in the Supreme Court. A petition was in fact filed by the plaintiff class (No. 78-1545) and TWA cross-petitioned (No. 78-1549). The Supreme Court granted motions to defer consideration of the petitions, however, pending completion of settlement negotiations in the district court. 442 U.S. 916 (1979).

As a result of the Seventh Circuit's ruling it was necessary to divide the plaintiff class into two sub classes. Class A plaintiffs were those stewardesses who had been fired within 90 days of the original EEOC charges. Class B consisted of those stewardesses who had been fired prior to that time.

Plaintiffs and TWA continued settlement negotiations. The proposed settlement agreement they eventually came up with provided that TWA would pay $3 million for pro rata distribution between the two plaintiff classes. The agreement also provided each class member with full retroactive company seniority. The agreement specified that competitive (union) seniority has to be decided by the court.

Following submission of the proposed settlement to this court, ALSSA's successor union, the Independent Federation of Flight Attendants ('IFFA"), intervened and objected to the grant of any seniority. IFFA challenged this court's jurisdiction to adjudicate seniority. Despite IFFA's challenge, in October 1979, this court approved the settlement agreement and granted full retroactive competitive seniority.

IFFA appealed. In June of 1980, the Seventh Circuit held that despite its earlier decision that the Class B plaintiffs' claims were jurisdictionally defective, this court had jurisdiction to approve the settlement which compromised on that issue. *ALSSA v. Trans World Airlines, Inc.*, 630 F.2d 1164, 1169 (7th Cir. 1980). The Seventh Circuit also affirmed this court's grant of full retroactive union seniority. *Id.*

IFFA petitioned the Supreme Court for certiorari. On March 9, 1981, the Supreme Court issued a writ of certiorari on IFFA's petition (No. 80-951) and also on the still-pending earlier petitions of the plaintiff class (No. 78-1545) (the class B jurisdictional issue) and TWA (No. 78-1549) (the liability issue). *See* 450, U.S. 979

(1981). TWA's petition was shortly thereafter removed from argument, *see* 451 U.S. 980 (1980), and was ultimately dismissed as improvidently granted. 455 U.S. at 392 n. 5.

On February 24, 1982, the Supreme Court issued its landmark decision in *Zipes*. The Court in *Zipes* reversed the Seventh Circuit's 1979 decision that the claims of the Class B plaintiffs were barred. The *Zipes* Court held that Title VII's filing requirement was subject to waiver like any other statute of limitations. 455 U.S. at 392-398. The Court also found IFFA's claims meritless. *Id.* at 398-401.

II. DISCUSSION

The instant fee petitions were filed by counsel for both Class A and Class B plaintiffs. Council for Class A plaintiffs seek an award against IFFA for those fees generated by IFFA's intervention in this case. Counsel for Class B seek fees both from IFFA for time spent defending IFFA's attacks upon this court's award of competitive seniority and from TWA for one-half of the time spent in the Supreme Court after certiorari was granted. The petition against TWA will be discussed first.

A. Fees From TWA

Despite the arguments of counsel for Class B plaintiffs, a review of plaintiffs' 1979 settlement agreement with TWA discloses that TWA's liability for any attorney's fees was fully resolved by that settlement agreement. The settlement agreement expressly excludes TWA from liability for any future payments, including fees.

Section II of the settlement agreements sets forth the purpose of the settlement:

> "II. This Agreement is entered into between Trans World Airlines, Inc. (hereinafter referred to as 'TWA') and the undersigned representatives of the class for the purpose of compromising, settling and

terminating all litigation of the lawsuits (including, but not limited to, the petitions for writs of certiorari now pending in U.S. Supreme Court, dockets numbers 78-1545 and 78-1549) and putting finally to rest all of the claims, issues and questions of fact and law which have or might have been raised on the facts alleged in the pleadings."

The petitions for certiorari were thus expressly addressed by the settlement.

Section III A of the settlement agreement provides that TWA would pay $3,000,000 to settle the case. One half of this amount was to go to the members of each Class. TWA's liability for attorney's fees was expressly included within the $3,000,000:

> After deduction therefrom of all amounts awarded by the court for plaintiffs' attorneys' fees, costs and expenses of litigation, the net amount will be prorated among the class members as provided in Section IV hereof. TWA has no responsibility concerning the calculations or allocations of the total amount among the class members or for fees, costs and expenses.

Thus, in paying the $3,000,000, TWA paid for all attorneys fees awardable against it in the litigation.

Plaintiffs point to the last sentence of Section III.A. quoted above to argue that TWA was only absolved of the responsibility of "calculating" or "allocating" the total amount of attorneys' fees, not the responsibility to pay fees. Plaintiffs' out of context emphasis on this one sentence misinterprets the clear intent of Section III.A. This section contemplated that all attorneys' fees assessable against TWA would come from the $3,000,000. Since the amount of fees was then unknown, however, the sentence referenced by plaintiffs merely provides that plaintiffs, rather than TWA, would be left with the task of "calculating" and "allocating" fees.

Section III.D. of the settlement agreement provides that:

> D. TWA will have no monetary or other obligation to any member of the class or to any representative or attorney for the class unless expressly provided in this Agreement.

Plaintiffs read this provision as meaning that TWA is liable for the Supreme Court attorneys fees absent an express agreement to the contrary. Plaintiffs again misread the clear language of the settlement agreement.

Plaintiffs argue that they could "hardly be deemed to have anticipated that the litigation with TWA would continue after the Settlement Agreement." Both Sections II and X of the agreement however refer specifically to the petitions for certiorari. Plaintiffs were also fully aware of IFFAs objections to the settlement and must have anticipated further contest from IFFA.

The underlying thrust of Class B plaintiffs' attack against TWA is that the attorney's fees generated by the necessity of fighting for the settlement in the Supreme Court were caused by TWA's litigation activities. As is clear from this court's May 6, 1982 order in this case, however, the post-settlement litigation was solely the result of IFFA's challenge to the settlement agreement.

As this court stated in the May 6 order at page 2:

> When the terms of an agreement are plain and clear, interpretation of that agreement is a matter of law to be left to the court. [citations omitted].

The settlement agreement in this case clearly provides that the portion of the plaintiff's attorneys' fees recoverable from TWA are to be paid only out of the $3,000,000 settlement. The settlement agreement is clear on this point and this court is bound by that agreement. *See Sealy Mattress Co. of Michigan, Inc. v. Sealy, Inc.*, 789

F.2d 582, 585 (7th Cir. 1986) (consent decrees to be construed strictly and "within its four corners"). Class B plaintiffs' have received over one and one quarter million dollars in attorney's fees from TWA under the agreement. Class B plaintiffs' petition for further fees from TWA is therefore denied.

B. FEES FROM IFFA

1. *Liability for Fees*

IFFA's principal argument against an award of fees is that it was in essence a "plaintiff" in this case and should therefore be subject to the fee standard set down in *Christianburg Garment Corp. v. EEOC*, 434 U.S. 412 (1978). In *Christianburg Garment* the Supreme Court held that when a prevailing Title VII defendant seeks fees against a losing plaintiff, a more rigorous standard applies than when a prevailing plaintiff seeks fees. A prevailing plaintiff is awarded fees almost automatically. *See Zabkowicz v. West Bend Co.*, 789 F.2d 540, 548 (7th Cir. 1986). A prevailing defendant however is only awarded fees if the plaintiff's action was "frivolous, unreasonable, or groundless." *Christianburg Garment*, 434 U.S. at 422.

As Class B plaintiffs point out, under *Christianburg Garment* the court's focus is on who is seeking fees *not*, as the IFFA asserts, on who fees are sought against. Plaintiffs are the "chosen instrument of Congress to vindicate 'a policy . . . of the highest priority' ", 434 U.S. at 418, and Title VII's fee provision was included to "make it easier for a plaintiff of limited means to bring a meritorious suit." *Id.* at 421. *See also Zabkowicz*, 789 F.2d at 552. No such lofty policy considerations are present when considering whether to award fees to a prevailing defendant; fees are only available to Title VII defendants to "deter the bringing of lawsuits without foundation." *Christianburg Garment*, 434 U.S. at 420.

The error in IFFA's attempt at focusing this court's attention on its plaintiff-like posture in this case is thus apparent. Fees are here sought by the prevailing plaintiffs. Fee awards to prevailing plaintiffs are encouraged and nothing requires them to show that their opponent's position was "frivolous" or maintained in bad faith. *See Eichman v. Linden & Sons, Inc.*, 752 F.2d 1246 (7th Cir. 1985); *Lampher v. Zagel*, 755 F.2d 99 (7th Cir. 1985). IFFA without question opposed plaintiffs in this case.

Neither does IFFA's assertion that intervenors enjoy special immunity from Title VII fees find support in case law. In *Moten v. Bricklayers, Masons and Plasterers*, 543 F.2d 224 (D.C. Cir. 1976), the court awarded fees against an "intervenor-union"[6] that had presented objections to a Title VII settlement agreement. Based on the union's objections, the plaintiffs were compelled to mount a defense "in order to maintain their hard won settlement agreement." *Moten*, 543 F.2d at 239. The *Moten* court concluded that: "We think the liberal purposes of 42 U.S.C. § 2000e-5(k) are furthered by, and provide authority for, an award against the [union]." *Id.* The fee award in *Moten* was not, as IFFA suggests, based on the frivolous of the union's position. *See also Haycraft v. Hollenbach*, 606 F.2d 128 (6th Cir. 1979).

Similarly, in *Allen v. Terminal Transport Co.*, 486 F. Supp. 1195 (N.D. Ga. 1980), *aff'd sub nom., U.S. v. Terminal Transport Co.*, 653 F.2d 1016 (5th Cir.), *cert. denied*, 102 S. Ct. 1613 (1981) fees were awarded against an intervenor-union even though the union was not liable for the underlying Title VII discrimination:

> [T]he unions have committed no actionable wrong here . . . . However, fees are not being taxed against the unions because the seniority perpetuated dis-

[6] The union had never formally presented a motion to intervene. The resulting disruption to the ultimately upheld settlement was the same as if the union had properly intervened.

crimination, albeit innocently; rather, they participated substantially in opposing the legitimate demands of the plaintiff class, so the unions should share the costs to the class.

486 F. Supp. at 1202. After discussing *Moten* and *Haycraft*, the *Allen* court concluded that the unions were liable for fees stating:

Notwithstanding the present arguments of the unions to the contrary, the actions of the labor defendants compelled the plaintiff class to defend its settlement and intensify its effort for further relief.

The Fifth Circuit not only affirmed the fee award, but remanded the case for assessment of additional costs and fees associated with the union's appeal. 653 F.2d at 1022.

While the cases in this area are not numerous they are consistent. *See Van Hoomissen v. Xerox Corp.*, 503 F.2d 1131 (9th Cir. 1974); *Akron Center for Reproductive Health v. City of Akron*, 604 F. Supp. 1268 (N.D. Ohio 1984); *Thompson v. Sawyer*, 586 F. Supp. 635 (D.D.C. 1984) (currently on appeal, D.C. Cir. #85-5264. *Cf. Robideau v. O'Brien*, 525 F. Supp. 878 (E.D. Mich. 1981) (§ 1988). Unsuccessful Title VII union intervenors are, like unsuccessful Title VII defendants, consistently held responsible for attorneys' fees.

The only case which arguably support IFFA's position focused on the union's "good faith" in intervening and thus misapprehended the nature of the inquiry that determines a fee award against an intervenor-union. *See Kirkland v. New York State Department of Correction Services*, 525 F. Supp. 1214 (S.D.N.Y. 1981). It is noteworthy that shortly after *Kirkland*, that same court awarded fees against a union-intervenor in circumstances nearly identical to this case. *Vulcan Society of Westchester County v. Fire Department*, 533 F. Supp. 1054 (S.D.N.Y. 1982). The summary in *Vulcan* closely reflects the facts underlying this case and persuasively suggests the propriety of a fee award against IFFA:

[The union-intervenors] litigated vigorously in opposition to many of plaintiffs' objectives, and struggled to prevent settlements the unions felt were against their interests. Their efforts imposed substantial costs upon plaintiffs, and plaintiffs prevailed over the unions' opposition on most of the issues involved, and particularly in obtaining settlements which the unions opposed.

533 F. Supp. at 1062. *See also City of Akron*, 604 F. Supp. at 1273.

It is indisputable that both plaintiff classes in this case prevailed. The case was hard fought and was brought during the infancy of Title VII. Due to the continued efforts of plaintiffs' attorneys, the classes won in this court, in the Seventh Circuit, and finally in the Supreme Court. Because of the IFFA's intervention, the plaintiff classes' ultimate victory was delayed and came at a greatly increased cost. This court considers it fair and just that IFFA now reimburse plaintiffs for the extra cost attributable only to their intervention.

2. *Amount of Fees for Class B*

Counsel for Class B plaintiffs have more than adequately documented and justified the fee award that they request. Their efforts on behalf of the plaintiff class were of the highest caliber throughout and are further well-reflected in their fee petition. Only a few comments are necessary at this point to dispose of IFFA's objections.[7]

[7] IFFA raises a handful of additional objections besides those listed. For example, IFFA asserts that the fee provisions of the Title VII apply only to "litigated judgments" rather than settlement. This argument, as well as the others raised, are without merit. *See Lovell v. City of Kankakee*, 783 F.2d 95 (7th Cir. 1986).

a. Fee multipliers are appropriate in this type of complex and protracted Title VII action. *See Blum v. Stenson*, 104 S.Ct. 1541 (1984); *Waters v. Wisconsin Steel Workers*, 502 F.2d 1309, 1322 (7th Cir. 1974). Plaintiffs' attorneys have cited countless other cases supporting this point. *See* Plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion to Award Attorneys' Fees Against the Union at 16-17. No purpose is served by reciting those cases here.

b. This court can properly award fees for time spent in this court as well as time spent on appeal. *See Ekanem v. The Health and Hospital Corp. of Marion County, Indiana*, 778 F.2d 1254, 1257, (7th Cir. 1985).

c. Plaintiffs' attorneys are entitled to compensation for the work underlying preparation of the instant fee dispute. *Bond v. Stanton*, 630 F.2d at 1231, 1235-36 (7th Cir. 1980).

d. Class B plaintiffs obtained the services of Attorney Raymond Randolph to assist in preparing for arguments in the Supreme Court. The duplication of effort caused by hiring Mr. Randolph is only reflected in the approximately twenty-five hours of time he spent reviewing the extensive history of this case. Mr. Randolph's requested time is reasonable and is fully compensable.

e. Plaintiffs' counsel are entitled to reimbursement for their out-of-pocket expenses. *Zabkowicz*, 789 F.2d at 553-54.

f. This court is not required to use different hourly rates for different types (*e.g.* in-court versus out-of-court) of work. *Berberena v. Coler*, 753 F.2d 629 (7th Cir. 1985).

3. *Amount of Fees for Class A*

Counsel for Class A plaintiffs are entitled to a fee award against the IFFA for the same reasons stated above for the Class B attorneys. The Class A attorneys

already have recovered the $57,258 in fees at issue from the settlement fund. IFFA is thus ordered to reimburse the fund in this amount.

III. CONCLUSION

For the reasons stated herein, the petition for attorneys' fees against TWA is denied. The petitions of Class A and Class B plaintiffs for attorneys' fees against IFFA are granted. Class B plaintiffs are awarded $171,747 in fees and $5,978 in expenses. IFFA is to pay the $57,258 awarded to Class A plaintiffs into the settlement fund.

ENTER:

/s/ Stanley J. Roszkowski
STANLEY J. ROSZKOWSKI
Judge
United States District Court

DATED: July 16, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 2071

AIR LINE STEWARDS and STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, *et al.*,
Plaintiffs,
vs.
TRANS WORLD AIRLINES, INC.,
Defendants.

No. 74 C 2063

ANNE B. ZIPES, *et al.*,
Plaintiffs,
vs.
AIR LINE STEWARDS and STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO and TRANS WORLD AIRLINES, INC.,
Defendants.

ORDER

Before the court are motions by the attorneys for subclass B plaintiffs ("plaintiffs' attorneys") and the Independent Federation of Flight Attendants (the "Union") to amend the attorney's fee awarded to plaintiffs' attorneys. For the reasons stated herein, the award is amended. Plaintiffs' attorneys are awarded $123,657.84 in attorney's fees.

DISCUSSION

On July 16, 1986, this court gave plaintiffs' attorneys a "lodestar" attorney's fee award of $85,873.50. Based on the "high caliber" of legal work performed by these attorneys on behalf of their clients, they were also awarded a loadstar multiplier of two. Plaintiffs' attorneys total attorney's fee award was therefore $171,747.00.

Following entry of the July 16 order, the parties called this court's attention to the recent Supreme Court decision in *Pennsylvania v. Delaware Valley Citizens Council*, 106 S. Ct. 3088 (1986). In *Delaware Valley* the Court held that:

> Because considerations concerning the quality of a prevailing party's council's representation normally are reflected in the reasonable hourly rate, the overall quality of performance ordinarily should not be used to adjust the lodestar, thus removing the damage of "double counting."

106 S. Ct. at 3099. Based on this holding, the Union has moved this court to amend the attorney's fee award by striking the multiplier.

Plaintiffs' attorneys have also moved to amend the attorney's fee award based on *Delaware Valley*. Plaintiffs' attorneys point out that *Delaware Valley* did not totally preclude the use of fee multipliers. Specifically, the *Delaware Valley* Court left open the question of whether the contingent nature of a case could justify awarding a fee multiplier. 106 S. Ct. at 3100. Accordingly, plaintiffs' attorneys request a multiplier based on the contingent nature of this case. Alternatively, they contend that the delay in receiving compensation mandates an upward adjustment of the fee award to reflect the time value of money.

Whether prevailing attorneys can ever be awarded additional compensation based on the contingent nature of a case, such an award is inappropriate in this case.

Plaintiffs' attorneys were fully compensated for any contingencies in the earlier \$1-1/4 million fee award which included a multiplier of two.

This court agrees, however, that plaintiffs' attorneys should be compensated for the time delay in payment. The Seventh Circuit has recognized that an upward adjustment to a fee award for this reason is permissible. *Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.*, 776 F.2d 646, 660 (7th Cir. 1985) (fee award may compensate attorneys for time value of money). This is especially true in cases like this one where none of the delay in payment was caused by the attorneys seeking fees.

Plaintiffs' attorneys suggests that the prime rate should be used to adjust the attorney's fees award. In this court's opinion, government treasury notes reflect a more realistic rate of return.[1] Through independent research, this court has discovered that a long-term treasury note purchased approximately five years ago would have given its purchaser an average return of approximately 7-1/2% to 8% per year. The more conservative estimate of 7-1/2% would result in an attorney's fee multiplier of 1.44.[2] Plaintiffs' attorneys are therefore awarded \$123,657.84 in attorney's fees (\$85,873.50 times 1.44).

ENTER:

/s/ Stanley J. Roszkowski
STANLEY J. ROSZKOWSKI
Judge
United States District Court

DATED: Sept. 18, 1986

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[1] It is of course impossible to know how plaintiffs' attorneys would have in fact used the money.

[2] The formula for determining the applicable multiplier is $(1 + r)^n$ where "r" equals the rate of interest and "n" equals the number of years for which interest is sought. *See* Davidson, Stickney and Weil, *Financial Accounting*, Appendix B (4th Ed. 1985). In this case "r" is 0.075 and "n" is 5.

AFFIDAVIT OF ARTHUR TEOLIS

(Filed in the District Court on July 15, 1982, as part of Intervenor IFFA's Appendix to Memorandum Briefs In Opposition To Plaintiffs' Request For An Award Of Attorneys Fees And In Regard To Amount Of Attorneys Fees Requested By Plaintiffs)

Arthur Teolis, being first duly sworn and upon his oath, deposes and says:

1. I am, and since April 1, 1977, have been, President of the Independent Federation of Flight Attendants (IFFA), a labor organization certified by the National Mediation Board as exclusive bargaining representative of all Flight Attendants in the employ of Trans World Airlines, Inc. (TWA).

2. The last date on which TWA hired Flight Attendants was May 31, 1979.

3. Under the terms of Article 12 of the collective bargaining agreement in effect between IFFA and TWA, furlough (layoff due to reduction in force) and recall from furlough are based on seniority (length of service) with TWA.

4. On October 31, 1979, TWA furloughed one hundred and sixty-seven (167) Flight Attendants. Since that date, TWA has furloughed an additional four hundred and twenty-two (422) Flight Attendants. None of these five hundred and seventy-nine (579) furloughed Flight Attendants have been recalled to employment with TWA. Included in the number of Flight Attendants furloughed and not recalled are Flight Attendants hired by TWA on April 7, 1977.

5. Under Article 12 (F) of the IFFA-TWA collective bargaining agreement, Flight Attendants on furlough for three (3) years are removed from the seniority list and lose their right to recall.

6. On October 31, 1982, the one hundred and sixty-seven (167) Flight Attendants furloughed on October 31, 1979 will, unless recalled prior thereto, be removed from the seniority list and lose their right to recall.

7. IFFA has been advised by TWA that it does not anticipate a recall of furloughed Flight Attendants prior to October 31, 1982.

8. On dates subsequent to October 31, 1982, the remaining four hundred and twenty-two (422) furloughed Flight Attendants will, unless recalled, lose their right to recall upon three years subsequent to their respective furlough dates.

/s/ Arthur Teolis
ARTHUR TEOLIS

Subscribed and sworn to before me this 6th day of July, 1982.

/s/ Felice Wetter
FELICE WETTER

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HONORABLE STANLEY J. ROSZKOWSKI, *Presiding Judge*

Cause Nos. 70C 2071 and 74C 2063

AIR LINE STEWARDS

vs.

TWA

June 13, 1982

ORDER

It is ordered that the defendant TWA shall pay from Subclass A's portion of the settlement fund the following amounts:

1. The amount of $89,362 shall be paid to Kevin M. Forde for attorney fees.
2. The amount of $25,155 shall be paid to Ann C. O'Laughlin as attorney fees.
3. The amount of $1,613.44 to Kevin M. Forde as reimbursement of expenses.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 2071

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION,
LOCAL 550, TWU, AFL-CIO, *et al.*,
Plaintiffs,

—vs—

TRANS WORLD AIRLINES, INC.,
Defendant.

No. 74 C 2063

ANNE B. ZIPES, *et al.*,
Plaintiffs.

—vs—

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION,
LOCAL 550, TWU, AFL-CIO and
TRANS WORLD AIRLINES, INC.,
Defendants.

ORDER RELATING TO ATTORNEYS' FEES
AND EXPENSES FROM THE SETTLEMENT FUND

This Court has considered the joint petition of Pressman & Hartunian and Arnold I. Shure, Professional Corporation, for award of attorneys' fees and reimbursement of expenses out of the settlement fund. This Court conducted a hearing on June 15, 1982 pursuant to notice to all parties and class members and no class member or any other person has objected to the petition.

The Court finds that Petitioners' statements of hours, hourly rates and expenses are reasonable and the Court accepts them as being correct.

The Court further finds that this litigation was protracted, burdensome and fraught with contingent risks to the plaintiffs' lawyers. The quality of the legal services has been excellent and long delay has occurred without compensation. These factors justify the multiple (2 times hourly rates) which the Petitioners seek.

This Court finds that these Petitioners are entitled to attorneys' fees and reimbursement of expenses from the settlement fund, as follows:

Attorneys Fees:	$1,250,000
Expenses:	24,330

Accordingly, it is ordered that Defendant Trans World Airlines pay to Pressman & Hartunian and Arnold I. Shure, Professional Corporation, the total sum of $1,274,-330 for attorneys' fees and reimbursement of expenses, in the following manner: within 30 days after transmission to TWA of the data called for in Part IV of the Settlement Agreement, said sum shall be deposited into an escrow. The terms of the escrow shall require payment to Pressman & Hartunian forty-five (45) days after the date called for in Part IV of the Settlement Agreement if no timely notice of appeal from this order is filed, for distribution by Pressman & Hartunian pursuant to their agreements with Messrs. Shure and Randolph. Income earned during the escrow shall belong to Petitioners. If the parties are unable to agree on either the choice of an escrowee or the other terms of the escrow, this Court will resolve the dispute on motion and due notice.

This order relates only to attorneys' fees and expenses from the settlement fund. The proceedings on the claims

for attorneys' fees against Trans World Airlines and the Union will continue as previously scheduled.

Trans World Airlines shall make the distributions to the class members as and when required under Part IV of the Settlement Agreement.

This order is a final judgment to be entered forthwith under Rule 54, F.R.C.P. Pursuant to Rule 54(b), F.R.C.P., this Court finds that there is no just reason for delay.

ENTER:

/s/ Stanley J. Roszkowski
STANLEY J. ROSZKOWSKI
Judge

AGREED AS TO FORM:

/s/ Laurence A. Carton
LAURENCE A. CARTON

/s/ Aram A. Hartunian
ARAM A. HARTUNIAN

/s/ Arnold I. Shure
ARNOLD I. SHURE

Date: June 17, 1982

* * (Caption—Nos. 70 C 2069, 70 C 2071) * *

MEMORANDUM OPINION AND ORDER

(Entered November 20, 1974)

These actions are class action Title VII equal employment sex discrimination cases challenging the practice of Trans World Airlines and American Airlines of terminating the employment of pregnant stewardesses. The cases are now before the Court on defendants' motions to amend their answers to include the affirmative defense of the statute of limitations.[1] Plaintiffs oppose these motions, asserting that (1) defendants have been guilty of unreasonable delay in asserting this defense, and (2) justice does not require defendants' being granted leave to amend because it would be unduly prejudicial to plaintiffs.

The following facts are relevant to disposition of these motions:

The complaints were filed on August 18, 1970, and defendants' answers were submitted to the Court on September 30, 1970.[2] There were no further proceedings in Court until July 16, 1971, when a settlement agreement was filed. But in the interim the airlines and the union

---

[1] The statute of limitations for Title VII actions is contained in 42 U.S.C. § 2000e-5e. At the time these actions were filed, the statute provided that to sustain an action under Title VII a charge must have been filed with the Equal Employment Opportunity Commission within 90 days after the alleged unlawful employment practice occurred. The time limit was increased to 180 days by the amendment of March 24, 1972 (P.L. 92-261, § 4).

[2] Defendants' answers contained two other affirmative defenses: first, that defendants' conduct was based upon a continuing policy which was a "bona fide occupational qualification reasonably necessary to the normal operation' of defendant's business within the meaning of 42 U.S.C. § 2000-2(e)," and the second, that the policy is "pursuant to a 'system which measures earnings by quantity and qualify or production' within the meaning of 42 U.S.C. § 2000e-2(h)."

amended their labor agreements to eliminate pregnancy as a ground for termination, and negotiated the settlement agreement. The hearing on that agreement began on March 10, 1972; the intervening delays was caused by the effort of the EEOC to intervene, including its appeal to the Seventh Circuit. On April 11, 1972, several plaintiffs filed their notices of appeal from the order approving the settlement agreement. Their appellants' brief was not filed until February 5, 1973. The Seventh Circuit decision reversing the order approving settlement was issued on December 23, 1973,[3] the Supreme Court denied a writ of certiorari on May 13, 1974. The case was assigned to this Court on July 11, 1974. TWA and American then filed their motions to amend the answers on September 11, 1974, the date set by the Court for a status report.

F. R. Civ. P. 15(a) provides that leave to amend "shall be freely given when justice so requires." The Supreme Court in *Farman* v. *Davis*, 371 U.S. 178, 182 (1962) held that this mandate is to be heeded, stating:

> "In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.' "

In the instant actions, plaintiffs could be unduly prejudiced by amendment. The absence of the defense of

[3] In *Air Line Stew. & S. Ass'n, Local 550 v. American Airlines*, 490 F.2d 636 (7th Cir. 1973), the court of Appeals reversed the settlement order previously entered in these actions. The court held that the Union could not act as representative of the individual stewardesses terminated because of conflict of interest in the Union over such matters as seniority. Moreover, the court determined that these actions should proceed as R. F. Civ. P. 23(b)(3) class actions instead of F. R. Civ. P. 23(b)(2) class actions.

limitations could have been considered by the present plaintiffs when they rejected the union-airlines settlement agreement and appealed the orders approving settlement to the Seventh Circuit. At that time plaintiffs could reasonably believe that the pleadings were completed especially considering the class allegations contained in these actions. Notice of the proposed settlement to members of the classes invited "any interested person or attorney" to inspect "all pleadings and other documents in the action." None of the documents apparently contained any notice of the statute of limitations defense although the Union's attorney did mention the possibility of the defense during oral hearings on the settlement agreement.

Plaintiffs also argue that even if undue prejudice cannot be shown, defendants should not be allowed to amend because they have been guilty of undue delay in asserting the limitations defense. Defendants justify their delay in filing the defense on three grounds: (1) legal uncertainty about availability of the defense; (2) active participation in the aborted settlement negotiations and (3) no district court judge had jurisdiction over the actions while the various appeals were pending.

Defendants assert that when the complainants were filed in 1970, there had been few decisions construing the limitations problems inherent in Title VII class actions. It is important to note, however, that defendants do not claim that the limitations language of the statute was ambiguous, nor do defendants assert that there were no cases to rely on for guidance. In fact, defendants cite a 1969 case, *Burney* v. *North American Rockwell*, 302 F. Supp. 86 (C. D. Cal. 1969), to support their substantive point that the Title VII statute of limitations affects unnamed class plaintiffs as well as named or individual plaintiffs.

Moreover, defendants make no showing how these proceedings could have prevented them from making a mo-

tion to the Court to amend their answers, particularly when defendants original answers contained two other affirmative defenses. Additionally, the existence of this defense, properly plead, should have been a factor in defendants' posture during this stage of the litigation. That defendants failed to fully investigate the legal status of plaintiffs' claims at that time only demonstrates that defendants may not have completely prepared during settlement negotiations, not that the negotiations themselves prevented defendants from presenting their legal arguments to the Court.

Defendants' third argument that the pending appeals prevented them from amending also seems inequitous. While it is true that for substantial periods since filing in 1970 no district court judge had jurisdiction over these cases, defendants do not satisfactorily explain why when the district court did have jurisdiction (from filing in 1970 to April 1972), they made no motion to amend.

Defendants' delay in pleading the defense of limitations may well ultimately constitute a waiver of the defense; at this juncture, however, the Court is not convinced to a legal certainty that pleading of the defense shall not be allowed. Under the liberal pleading rules contained in Rule 15, defendants should be entitled to prove through discovery techniques or otherwise that the plaintiffs suffered no prejudice or that the delay in amendment was excusable. Defendants' motion to amend their answers is granted.[4]

IT IS SO ORDERED.

Entered:

/s/ R. W. McLaren
United States District Judge

Dated: November 18, 1974.

[4] Of course, this disposition of defendants' motions is not intended to express any ultimate views on the waiver or laches issues or the substantive applicability of the 180 day statute of limitations.

Section 706(k) of Title VII
of the Civil Rights Act of 1964,
42 U.S.C. § 2000e-5(k)

Attorney's fee; liability of Commission
and United States for costs

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 1988

Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and crimnal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

EXCERPT FROM THE JUNE 18, 1979 SETTLEMENT AGREEMENT BETWEEN PLAINTIFFS AND TWA

XIII. EXCLUSIVITY

Nothing contained in any other agreement or writing and no right or obligation which has arisen or accrued outside of this Settlement Agreement (including prior, current and future labor agreements) shall be deemed to modify, change or diminish the rights and obligations which arise under this Agreement.

OPPOSITION BRIEF

No. 88-608

(2)

In The
Supreme Court of the United States
October Term, 1988

INDEPENDENT FEDERATION OF
FLIGHT ATTENDANTS,
Petitioner,

v.

ANNE B. ZIPES, et al.,
Respondents.

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

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In The Supreme Court of the United States

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INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

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ANNE B. ZIPES, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Summary Of Argument

Since the Union did not assert Title VII rights or Constitutional rights, there is no conflict within the circuits that is relevant to this case.

All of the Circuits deem innocence of a federal violation to be an insufficient reason to deny an award of attorneys' fees where an intervenor chose to and became the prevailing plaintiff's principal protagonist, as was the case here.

Since the Plaintiffs prevailed against the Union on the questions of liability, jurisdiction, and seniority relief, and the Union did not demonstrate any unusual circumstances, Plaintiffs were entitled to an award of attorneys' fees within the discretion of the district court.

I. THERE ARE NO CONFLICTS WITHIN THE CIRCUITS THAT ARE RELEVANT TO THIS CASE

A. Since The Union Was Not A "Functional Plaintiff, The Outcome Would Have Been The Same In The Eleventh And D.C. Circuits

In Section 706(k) of Title VII, Congress carved out an exception to the "American Rule" by leaving it to the court's discretion whether to award attorneys' fees to the prevailing party. In *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412 (1978), this Court established the standard for exercising that discretion: a prevailing plaintiff will ordinarily be awarded attorneys' fees, but a losing plaintiff will be required to pay the defendant's attorneys' fees only when the plaintiff's case is frivolous, unreasonable or without foundation. 434 U.S. at 422.

Christiansburg thus arms Title VII plaintiffs with both a sword and a shield. Both are keyed to the plaintiffs acting as Congress' chosen instrument for enforcing Title VII. 434 U.S. at 419. The almost automatic recovery of fees to prevailing Title VII plaintiffs enhances the prospects of their obtaining competent counsel. The almost automatic immunity from being required to pay the attorneys' fees of successful defendants serves the same underlying purpose.

The doctrine of *Christiansburg* might logically be expanded to protect not only those parties who are Title VII plaintiffs but also those parties who, acting *like*

Plaintiffs, assert their own Title VII rights. However, wearing the mantle of a "functional plaintiff" means more than merely being a party who asserts a right. A losing plaintiff is spared the attorneys' fees of a winning defendant not simply because he is a plaintiff; it is because he is a plaintiff who asserts *Title VII* rights, thereby acting as Congress' chosen instrument for the enforcement of Title VII.

In resisting the Plaintiffs' efforts to obtain seniority relief, the Union asserted rights, but not *Title VII* rights, as is clearly shown in *Zipes v. Trans World Airlines*, 455 U.S. 385 (1982), the case in which the Union opposed Plaintiffs. The Union argued that the court lacked jurisdiction to implement the settlement agreement, 455 U.S. at 393, and that seniority relief could not be granted to Plaintiffs in the absence of either: 1) a finding of discrimination with respect to the members of Subclass B, 455 U.S. at 399, or 2) a finding that the Union itself had been guilty of discrimination.[1] 455 U.S. at 400.

The extent to which the Seventh Circuit disagreed with the "functional plaintiff" analysis of the Eleventh Circuit in *Reeves v. Harrell,* 791 F.2d 1481 (11th Cir. 1986), *cert. denied,* 107 S.Ct. 880 (1987) is thus irrelevant to this case. Since the Union did not assert Title VII rights, even the Eleventh Circuit would have imposed the Plaintiffs' attorneys' fees upon the Union. Put another way, even if the Seventh Circuit agreed completely with the Eleventh Circuit, it would have awarded the Plaintiffs'

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[1] Ironically, the Union here makes the same argument against liability for the prevailing Plaintiffs' attorneys' fees that the Union advanced in *Zipes* against the Plaintiffs obtaining seniority relief. In *Zipes,* this Court found "meritless" the Union's contention that relief was not forthcoming to the Plaintiffs because the Union had not been guilty of wrongdoing. 455 U.S. at 400.

attorneys' fees against the union.

Similarly, there is no relevant conflict between the Seventh and District of Columbia Circuits. In *Grano v. Berry,* 783 F.2d 1104 (D.C. Cir. 1986), the lower court's denial of fees against the intervenor was affirmed because of the special circumstance of the intervenor's assertion of Constitutional rights. 783 F.2d at 1112. Here, the Union did not assert any Constitutional rights.

If a case is presented in which both the winner and the loser assert either Title VII or Constitutional rights, the losing party against whom attorneys' fees are awarded would arguably have standing to seek resolution of the "conflicts" promenaded in Petitioner's brief. This is not such a case.

B. The Result Would Have Been The Same In The Second And Third Circuits

In *Turnstall v. Office of Judicial Support [etc.],* 820 F.2d 631 (D.C. Cir. 1987), and *Annunziato v. The Gan, Inc.,* 744 F.2d 244 (2d Cir. 1984), fees were denied to prevailing plaintiffs against parties who were named as nominal defendants in order to secure complete relief. As stated in *The Gan,* the third party against whom fees were sought was "caught in a cross-fire between plaintiffs and [the principal defendants]". 744 F.2d at 253. In these respects there is no conflict because nothing in the opinion below indicates that the Seventh Circuit would have ruled differently in that situation.[2]

[2] The distinction was aptly voted by the Seventh Circuit in *Charles v. Daley,* 846 F.2d 1057, 1065 (n. 11) (7th Cir. 1988), where "the intervenors voluntarily thrust themselves into the lawsuit and . . . tenaciously engaged the plaintiffs in a protracted and costly court battle. . . .".

Here, the Union opposed the Plaintiff class (Resp. App., 12a) in every way. The Union not only resisted the restoration of competitive seniority, but by its own choice fought the Plaintiffs all over again on the principal issue of the liability phase of the case. The Union's chosen stance in this case does not faintly resemble an innocent party caught in a cross-fire between the principal adversaries. In fact, during the period covered by the fees issue (1979-1982), the Union was the Plaintiff class's *only* adversary.

At the inception of this case in 1970, the Union (actually the predecessor union, then representing the same incumbent union members) posed as the representative of the class members and attempted to give away their rights in a proposed settlement that would have pleased only TWA and the Union. That settlement agreement was disapproved and the Union was ejected as the representative of the class. See *Air Line Stewards & Stewardesses Association v. American Airlines,* 490 F.2d 636 (7th Cir. 1973). The union was not heard from again until 6 years later, when the class finally received meaningful relief in a second settlement agreement. In that settlement, TWA gave up its argument that the late EEOC filings of some of the class members ("Sub Class B") deprived the court of jurisdiction. When the Union intervened in 1979, it promptly picked up the cudgel which TWA had dropped, and argued that the entire settlement agreement was unenforceable for want of jurisdiction. In doing so, the Union became the class' adversary to the same extent that TWA had been up to that time.[3] Had the Union been successful, the class would have received nothing – no monetary relief, no right to return

[3] As pointed out by the Seventh Circuit, "The settlement phase of this case pitted the plaintiff class against intervening defendant IFFA". (Resp. App., 12a)

to work, no company seniority, and no competitive seniority. With TWA cheering from the sidelines, the Union took the case all the way to this Court, where the class finally prevailed. *Zipes v. Trans World Airlines,* 455 U.S. 385 (1982).

C. The Ninth Circuit Is Not In Conflict With The Seventh Circuit

In *Richardson v. Alaska Airlines,* 750 F.2d 763 (9th Cir. 1984), fees were denied not because the intervenor union was innocent of violating federal law, but because 29 U.S.C. 626(b) provides for attorneys' fees only against an offending "employer". (See Resp. App. 82, fn. 5). Also, *Richardson* is not contra the Seventh Circuit on the question whether an attorneys' fees award should be imposed on a party who had an obligation to intervene and fight the case. The union simply had no such obligation here. (See Resp. App. 14a-16a).

II. THE FEE AWARD WAS WELL WITHIN THE DISCRETION OF THE COURTS BELOW

The policy considerations underlying 706(k) militate strongly against exempting unions from liability for attorneys' fees incurred by Title VII plaintiffs at the relief stage. The fees provision was included to make it easier for a plaintiff of limited means to bring a meritorious suit. *Christiansburg,* 434 U.S. at 421. Rightful place seniority is an integral part of the remedy. *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 764-766 (1976). Every Title VII plaintiff ought to know that even after proving discrimination, meaningful relief will not be forthcoming without militant opposition from the incumbent employees, usually headed up by a well heeled union. After 9 years of legal combat with TWA, the class

members spent 3½ more years litigating with the Union.[4]

The uniqueness of these facts rendered this case tailor-made for the exercise of discretion under the dictates of *Christianburg,* and for the same reason, inappropriate for review by this Court.

CONCLUSION

If there are any conflicts between the circuits, this case does not present the issues which relate to the conflicts. Granting *certiorari* could serve no purpose other than to review the district court's exercise of discretion.

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ANNE B. ZIPES, et al.

[4] In the 3½ years of satisfying the Union's thirst for litigation, the Plaintiffs' lawyers put in 942.2 hours. (Resp. App., pp. 1) Getting paid for those 3½ years has (so far) taken another 6 years.

APPENDIX

(Excerpt from Petition For Award Of Attorney's Fees And Reimbursement of Expenses)

B. From The Union

Petitioners defended the class members against the Union's attacks upon this Court's award of competitive seniority, first in the this Court, then in the Union's appeal to the Seventh Circuit, and finally in the Supreme Court where this Court's seniority Order was affirmed. In the following table, the Union is charged with all of the time spent in this Court on the retroactive-seniority dispute, all of the time spent in the Union's appeal to the Seventh Circuit and the Union's petition for certiorari, and one-half of the 473.2 hours spent in the Supreme Court. (The other one-half is attributed to TWA).

For these hours, Petitioners request a multiple of 2 times billing rates, resulting in fees from the Union in the amount of $172,107 plus $5,978.39 in expenses.

FEES VS. THE UNION (AT MULTIPLE OF 2)

	Hours	Billing Rate	Am'treq'd
Aram A. Hartunian	322.75	160	103,280
A.R. Randolph	149.60	150	44,880
Mr. Randolph's Associates	21.5	100	4,300
Joel M. Hellman	15.75	90	2,835
Ronald Futterman	8.75	125	2,187
Arnold Shure	48.75	150	14,625
Total fees vs. the Union			$172,107

Expenses:	
District Court:	$1,233.47
Court of Appeals:	1,015.07
Supreme Court (One-half of total)	3,729.85
Total expenses chargeable to union (See detail at App. pp.2-3)	$5,978.39
Total fees and costs vs. the Union	$178,085.39

REPLY BRIEF

3

No. 88-608

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Petitioner,
v.
ANNE B. ZIPES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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OCTOBER TERM, 1988

No. 88-608

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
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v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONER'S REPLY BRIEF

ARGUMENT

Because we believe Respondents' Brief in Opposition avoids the question actually presented, we file this short reply.

A "functional plaintiff" is someone who did not violate the law and was never accused of doing so, but who is in court complaining that the resolution of litigation may affect his rights, regardless of whether that party is an intervenor or "nominal defendant." IFFA unquestionably meets this test, which is certainly why the Panel majority below felt it necessary to state so clearly its disagreement with the Eleventh Circuit in *Reeves v. Harrell,* 791 F.2d 1481 (11th Cir. 1986), *cert. denied,* —— U.S. ——, 107 S.Ct. 880 (1987). Respondents here

claim that a "functional plaintiff" in a Title VII case must be asserting a Title VII claim—apparently asserting rights under a collective bargaining agreement, the Railway Labor Act, or perhaps even the Constitution is not enough—an argument which to our knowledge has never been articulated by any court. The "functional plaintiffs" in *Reeves* were not claiming that the defendants had violated their rights *ab initio*, but merely that what defendants had agreed to do and what the court had ordered as a result of a settlement of the plaintiffs' claims was violating their rights. IFFA found itself in the same position.[1]

Similarly, the property owners who were intervenors or nominal defendants in *Grano v. Barry*, 783 F.2d 1104 (D.C. Cir. 1986), *Annunziato v. The Gan, Inc.*, 744 F.2d 244 (2nd Cir. 1984), and *Tunstall v. Office of Judicial Support*, 820 F.2d 631 (3rd Cir. 1987), were not complaining that the state defendants had violated their rights, but that what the plaintiffs were seeking from the court and the state defendants *might* bring about such a violation. The denial of fees in each instance springs not from the source of the rights asserted but from the fact that the intervenor or nominal defendant was innocent of any legal wrongdoing. *The Gan*, 744 F.2d at 254; *Tunstall*, 820 F.2d at 634; *Reeves*, 791 F.2d at 1484. The policy considerations which justify fee-shifting simply do not apply against a third-party that has not violated the law. *Richardson v. Alaska Airlines, Inc.*, 750 F.2d 763, 766 (9th Cir. 1984).[2] Or, as the Second Circuit said:

[1] The Court should be aware that certiorari has been sought in *Charles v. Daley*, 846 F.2d 1057 (7th Cir. 1988), *sub nom. Diamond v. Charles*, No. 88-664.

[2] Plaintiffs' attempt to distinguish *Richardson* only highlights the conflict. The Ninth Circuit believes that the union had an obligation to intervene, while the Seventh Circuit Panel majority saw no such obligation in a very similar situation.

> [A]bsent proof that The Gan violated plaintiffs' constitutional rights or knowingly acted in concert with a state actor that did, The Gan, as a private party, cannot be held liable for attorneys fees under § 1988. This is so even though The Gan's participation in the litigation may have served to increase the amount of fees generated by plaintiffs' counsel. *The Gan*, 744 F.d at 254.

This statement simply cannot be reconciled with the result below.

Nor is any distinction justified on the basis that IFFA and the incumbent employees "voluntarily thrust themselves into the lawsuit". Although the third-parties in *Tunstall* and *The Gan* were nominal defendants rather than intervenors, they strongly resisted the attempts to infringe upon their rights. IFFA was caught in the "cross-fire" every bit as much as the third-parties in *Tunstall* and *The Gan*. And while IFFA did choose to fight, as the Second Circuit noted, parties in such a predicament have "no *real* choice." *The Gan*, 744 F.2d at 254, n.4 (emphasis in original).

CONCLUSION

The writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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November 16, 1988

JOINT APPENDIX

6

11

No. 88-608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Petitioner,

v.

ANNE B. ZIPES, *et al.*,
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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 11, 1988
CERTIORARI GRANTED JANUARY 17, 1989

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NOTATION RE DOCUMENTS PRINTED IN APPENDIX TO PETITION FOR CERTIORARI

The following documents have been omitted in printing in this Joint Appendix because they appear at the following pages in the appendix to the Petition for Certiorari:

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

Date	Proceedings
5-27-82	Plaintiff Class Petition for Award of Attorney's Fees and Reimbursement of Expenses
5-27-82	Appendix to Petition for Award of Attorney's Fees and Reimbursement of Expenses
5-28-82	Petition of Counsel for Subclass A for an Award of Attorney's Fees
6-17-82	Order dated June 13, 1982 directing TWA to pay from the settlement fund $116,130.44 to counsel for Subclass A
7-26-82	Order dated June 24, 1982: Petition of Pressman & Hartunian and Arnold I. Shure for award of attorney's fees and reimbursement of expenses out of settlement fund is granted
7-22-86	Order dated July 16, 1986 denying petition for attorney's fees against TWA, and granting Petition for Attorney's fees against IFFA in the amount of $57,258 for Subclass A, and $171,747 for Subclass B plus $5,978 in expenses
9-24-86	Order dated September 17, 1986 reducing award of attorney's fees in favor of Subclass B to $123,657.84

Rec. No. 2

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 70 C 2071

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO; PAMELA DAILING; SADIE SUE LAKE; PAT SANTINI; VIRGINIA HIRT; AND BONNIE YODER,

Plaintiffs,

vs.

TRANS WORLD AIRLINES, INC.,

Defendant.

COMPLAINT

(Filed August 18, 1970)

Now come Plaintiffs by their attorneys and complain of the Defendant as follows:

1. This is a class action, authorized and instituted pursuant to Title VII of the Civil Rights Act of 1964, 42 U. S. C. 2000e, et seq. Jurisdiction of the Court is invoked pursuant to 28 U. S. C. 1343(4); 42 U. S. C. 2000e-5(f), 28 U. S. C. 2201 and 2202 and 42 U. S. C. 1981.

2. Plaintiff Air Line Stewards and Stewardesses Association, Local 550, TWU, AFL-CIO (hereinafter referred to as "Plaintiff Union") is a labor union and a representative of employees as defined in the Railway Labor Act, 45 U. S. C. 151.

3. Defendant corporation is a carrier by air and an employer as defined in 45 U. S. C. 151 and 181. Defendant does business in the City of Chicago and State of Illinois. Unlawful employment practices as alleged herein have been committed by Defendant in the City of Chicago and State of Illinois. Plaintiffs in this cause would have worked in Chicago, Illinois, but for the unlawful employment practice committed by Defendant. Defendant is engaged in an industry affecting commerce, is the employer of more than 100 persons and is an employer within the meaning of 42 U.S.C. 2000e-(b).

4. The individual Plaintiffs named herein were employed by Defendant as female flight cabin attendants prior to the events, and the commission of unlawful employment practices alleged herein. Each individual Plaintiff has been, desires to become and/or in the future will desire to become pregnant. Said Plaintiffs bring this action, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on their own behalf and on behalf of all female flight cabin attendants similarly situated currently employed by Defendant and/or employed by Defendant at any time since July 2, 1965 (hereinafter referred to as the "Class"). There are common questions of law and fact affecting the rights of members of the Class who are, and continue to be, deprived of rights by reason of the unlawful employment practices committed by Defendant as hereinafter alleged. These persons are so numerous that joinder of all members is impracticable. Common relief is sought. The interests of the Class are adequately represented by Plaintiffs. Defendant has acted or refused to act on grounds generally applicable to the Class. The relief requested herein is appropriate with respect to the Class as a whole.

5. Plaintiff Union is, and at all times material herein has been, the certified bargaining representative under the Railway Labor Act of flight cabin attendants employed by the Defendant, including the individual and Class Plaintiffs named and referred to herein. As such representative, the Plaintiff Union has the legal duty to

act impartially and fairly represent the interests of the individual Plaintiffs and the Class they represent. The commission by Defendant of unfair employment practices hereinafter alleged jeopardizes the Plaintiff Union's duty of fair representation to the individual Plaintiffs and the members of the Class. Plaintiff Union brings this action on its own behalf and on behalf of its members within the Class.

6. This is a proceeding (a) for a declaratory judgment as to the rights of the parties, (b) for a preliminary and permanent injunction, restraining and enjoining Defendant from discriminating against members of the Class because of their sex in ways which deprive them of equal employment rights and opportunities and affect their status as employees, and (c) for monetary relief and other appropriate relief.

7. The Defendant has intentionally and willfully engaged in unlawful employment practices, violative of 42 U.S.C. 2000e-2, continuously from July 2, 1965, the effective date of the Act, and still continuing, as follows:

(a) It has maintained a practice, policy or usage whereby it terminates the employment of female flight cabin attendants who become pregnant;

(b) It has, in the course of collective bargaining, demanded of the Plaintiff Union that, contrary to the desire and will of the Plaintiff Union, it accept and accede to a contract provision, practice, policy, or usage whereby female flight cabin attendants employed by it are terminated as employees when they become pregnant.

(c) It has terminated the employment of the individual Plaintiffs and the members of the Class they represent when such female persons, married or single, became pregnant. Such termination of employment has been effectuated by discharge, requested or demanded resignation or refusal to schedule such employees for further flying. Defendant has not terminated the employment of its male employees who have fathered children.

8. In response to a demand by the Plaintiff Union that it cease from the commission of such unfair employment practices, Defendant, on or about April 7, 1970, affirmed its intention to continue such conduct.

9. Grievances have been filed by the Plaintiff Union and its members under the collective bargaining contract between the Plaintiff Union and the Defendant protesting the aforesaid conduct by Defendant, but Defendant has in all cases denied such grievances.

10. Each of the individual Plaintiffs, and each member of the Class represented by them, has suffered and will continue to suffer irreparable harm by reason of the illegal conduct of Defendant. Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs alleged herein unless this Court affords them the equitable relief prayed for.

11. On or about June 1, 1970, the Plaintiff Union filed a charge with the Equal Employment Opportunity Commission (hereinafter referred to as the EEOC) alleging the aforesaid unfair employment practices. The EEOC notified the Plaintiff Union on July 31, 1970, that it was entitled to initiate a civil action in a United States District Court, as provided in 42 U.S.C. 2000e-5(e) and (f). The Plaintiff Union has its offices in the State of Illinois. Illinois does not have a law prohibiting the unlawful employment practices complained of herein.

Wherefore, Plaintiffs respectfully pray that this Court advance this case on the docket, order a speedy hearing at the earliest practical date, and, upon such hearing:

(a) Declare the rights of the parties, finding that the aforesaid practice, policy, usage and/or contract provision and conduct of the Defendant are violative of the Act;

(b) Grant Plaintiffs and the Class they represent a preliminary and permanent injunction enjoining Defendant from conduct violative of the Act;

(c) Order Defendant by mandatory injunction to take such affirmative actions as are necessary to assure that the effects of said violations are eliminated and do not continue to adversely affect the employment rights of Plaintiffs and the Class they represent;

(d) Order Defendant to provide monetary relief including backpay to any of the Plaintiffs or members of the Class they represent for monetary losses sustained by them by reason of the violations of the Act by Defendant;

(e) Order Defendant to pay Plaintiffs' costs in this action;

(f) Order the Defendant to pay a reasonable attorney's fee; and

(g) Order such other and additional relief as to the Court seems necessary or proper.

/s/ Gilbert Feldman
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/s/ Barbara J. Hillman
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Rec. No. 7

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 2071

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWC, AFL-CIO, PAMELA DAILING, SADIE SUE LAKE, PAT SANTINI, VIRGINIA HIRT and BONNIE YODER,

Plaintiffs,

v.

TRANS WORLD AIRLINES, INC.,

Defendant.

No. 74 C 2063

ANNE B. ZIPES, FRANCES M. SWIFT, *et al.*,

Plaintiffs,

v.

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWC, AFL-CIO and TRANS WORLD AIRLINES, INC.,

Defendants.

SETTLEMENT AGREEMENT

I. DEFINITIONS

As used herein, the following words and phrases shall have the following meanings:

"Lawsuits" shall mean the cases listed in the caption of this Settlement Agreement.

"Hostess" shall mean a female flight cabin attendant.

"Class" shall include those persons who have comprised the class as heretofore defined in Orders which have been entered in Case No. 70 C 2071 on July 16, 1971, September 16, 1974 and October 10, 1974 and who have not previously opted out under Rule 23(c)(2)(A), F.R.C.P. In the event that the Court enters an Order which creates two or more subclasses, the word "class" shall include all of the persons who comprise the subclasses. For the purposes of this Agreement, the Class is treated as consisting of two subclasses as delineated in the opinion of the U.S. Court of Appeals for the Seventh Circuit in *In Re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142 (7th Cir. 1978).

"Class Group A" shall mean: (1) those persons who were terminated as TWA hostesses on account of pregnancy or the adoption of a child, *and* the pregnancy ended or the adoption occurred on or after March 2, 1970, and (2) those persons who were terminated as TWA hostesses on or after July 2, 1965 on account of pregnancy or the adoption of a child, *and* the pregnancy ended or the adoption occurred prior to March 2, 1970 but who were thereafter reinstated in ground duty positions, *and* who continued their employment as ground personnel continuously until on or after March 2, 1970.

"Class Group B" shall mean those persons who are members of class Group A, who were terminated as hostesses by TWA on or after July 2, 1965 on account of pregnancy or the adoption of a child *and* the pregnancy ended or the adoption occurred prior to March 2, 1970.

"Terminated" shall mean fired or forced to resign.

"Compensation Period" shall mean the period of time which commenced upon the termination of a class member's employment and ends on the date on which this Settlement Agreement is signed by TWA but it does not include any period after the beginning of re-employment for which TWA offered or granted reinstatement as a hostess with full pay, seniority and credit for length of service retroactive to the time when she was ready, willing and able to resume working as a hostess.

"Final Order Date" shall mean the date on which the order described in Section X becomes final and no longer subject to court review.

II. This Agreement is entered into between Trans World Airlines, Inc. (hereinafter referred to as "TWA") and the undersigned representatives of the class for the purpose of compromising, settling and terminating all litigation of the lawsuits (including, but not limited to, the petitions for writs of certiorari now pending in U.S. Supreme Court, docket numbers 78-1545 and 78-1549) and putting finally to rest all of the claims, issues and questions of fact and law which have or might have been raised on the facts alleged in the pleadings.

The parties hereto agree that the execution of this Agreement by TWA is not and shall not be construed as an admission by it or deemed to be evidence of the validity of any such claims or its liability for any such claims or of any unlawful acts by it whatsoever, nor shall this Agreement or any of the terms hereof be offered or received in evidence in any civil or administrative action or proceeding as an indication of wrongdoing by TWA or of its legal position in this or other litigation. TWA expressly disclaims any liability in these lawsuits and states that it is entering into this Agreement to avoid further expenses, inconvenience and the distraction of burdensome and protracted litigation.

III. SETTLEMENT BENEFITS TO BE OBTAINED BY CLASS MEMBERS

In consideration of the execution of the Release described herein and in consideration of the dismissal of these lawsuits against TWA in all respects (except, possibly, as to the matters referred to in Section V.B), TWA hereby covenants and agrees to do the things and perform the acts described herein, at the times and in the manners set forth in this Agreement, all of which shall be subject to the conditions set forth herein.

A. TWA will pay to the Class the aggregate amount of Three Million dollars ($3,000,000), as follows:

1. TWA will pay to Class Group A the sum of One Million Five Hundred Thousand Dollars ($1,500,000);

2. TWA will pay to Class Group B the sum of One Million Five Hundred Thousand Dollars ($1,500,000).

After deduction therefrom of all amounts awarded by the Court for plaintiffs' attorneys' fees, costs and expenses of litigation, the net amount will be prorated among the class members as provided in Section IV hereof. TWA has no responsibility concerning the calculations or allocations of the total amount among the class members or for fees, costs and expenses.

B. TWA will re-employ as hostesses all class members who are ready, willing and qualified (as defined in Sections VI and IX) to perform the duties required in such re-employment. Any class member who is not either ready, willing or qualified (as defined in Sections XI and IX) for re-employment shall receive from TWA the trip passes described in Section VII.

C. All re-employed class members shall have, be credited with and enjoy the amount of seniority and credit for length of service as is provided in Section V hereof.

D. TWA will have no monetary or other obligation to any member of the class or to any representative or attorney for the class unless expressly provided in this Agreement.

IV. PAYMENT OF MONEY

TWA will distribute to each member of the class the money payment described in Section IIIA hereof no later than thirty (30) days following the Final Order Date or the date when the class representatives furnish to TWA the calculation for each class member as provided hereinafter, whichever last occurs; provided further, however, that if by that time the Court has not determined the total amounts of attorneys' fees and expenses, TWA will have until thirty (30) days following said determination in which to make the payments to class members. Upon such distribution, TWA will provide each class member with a copy of the calculation regarding her payment and will certify to the Court and the attorneys for the plaintiffs that all required payments have been duly made. TWA's obligation to make employer's F.I.C.A. contributions will be in addition to and independent of the terms of this Agreement.

CLASS GROUP A

Distribution of the money paid hereunder to the member of Class Group A shall be made on a pro-rata percentage basis to each member thereof calculated as follows. The amount of base pay which each class member would have earned during the compensation period (except for periods of disability as described in Section V.A) shall be reduced by her actual gross earnings during the compensation period. The percentage which each member's resulting amount bears to the total thus cal-

culated for all members of Class Group A shall then be applied to the settlement proceeds as calculated pursuant to Section III.A above and she shall receive the amount calculated thereby, less all appropriate deductions as provided above. For example, if the total net earnings thus calculated to have been "lost" by the entire Class Group A during the compensation period is $10,000,000, and a member's net loss of earnings is $50,000, she will receive one-half of one percent of the net settlement proceeds payable to Class Group A. The relevant facts and data will be gathered and utilized under the Court's supervision and direction.

Unclaimed or unpaid funds, if any, shall be distributed as the Court may direct.

CLASS GROUP B

Distribution of the money paid hereunder to the members of Class Group B shall be made on a pro-rata percentage basis to each member thereof calculated as follows. The amount of base pay which each class member would have earned during the compensation period (except for periods of disability as described in Section V.A) shall be reduced by her actual gross earnings during the compensation period. The percentage which each member's resulting amount bears to the total thus calculated for all members of Class Group B shall then be applied to the settlement proceeds as calculated pursuant to Section IIIA above and she shall receive the amount calculated thereby, less all appropriate deductions as provided above. For example, if the total net earnings thus calculated to have been "lost" by the entire Class Group B during the compensation period is $10,000,000, and a member's net loss of earnings in $50,000, she will receive one-half of one percent of the net settlement proceeds payable to Class Group B. The relevant facts and data will be gathered and utilized under the Court's supervision and direction.

Unclaimed or unpaid funds, if any, shall be distributed as the Court may direct.

V. SENIORITY AND CREDIT FOR LENGTH OF SERVICE

A. Each re-employed class member shall be credited with the amount of company seniority and length of service to which she was entitled at the date on which her employment was terminated plus company seniority and such length of service for the entire compensation period, except for those periods of time during which she was disabled from working by reason of pregnancy or otherwise. For each pregnancy which terminated in the birth of a child, the period of disability shall be deemed to be nine (9) months. In the event pregnancy was terminated other than by the birth of a child, the period of disability shall be deemed to be the number of weeks of the pregnancy.

B. TWA agrees with the class that the class members who will be re-employed shall be restored to full occupational (union) seniority and credit for length of service to the same extent as is provided in Section V.A above. However, in the event of the timely objection of any interested person, it is agreed that the amount of seniority and credit for length of service for the compensation period will be determined by the Court in its discretion, pursuant to the provisions of Section 706(g), and all other applicable provisions of law, without contest or objection by TWA. The Court's award of seniority and credit for length of service will be added to each class member's seniority and credit for length of service to which she was entitled at the time her employment was terminated. The Court's determination will be applied retroactively for all class members who are re-employed after the date of this Agreement but prior to said determination. The class representatives and their attorneys agree and covenant diligently to present to the Court the questions and issues involved in the Court's determination of seniority and credit for length of serv-

ice within a reasonable time after the entry of an order approving the settlement.

VI. ELIGIBILITY FOR RE-EMPLOYMENT

TWA agrees to offer: (1) flight attendant retraining to all class members and (2) re-employment as flight attendants to those class members who satisfactorily complete such retraining. TWA will provide retraining classes, the last of which shall commence prior to the expiration of one (1) year following the Final Order Date. TWA will have no obligation to retrain or re-employ any class member following the end of such one (1) year period if such class member has either not qualified for such retraining or re-employment, has elected not to participate in such retraining or has elected not to accept such re-employment during such one (1) year period. TWA will not discriminate in any way against any class member by virtue of the fact that she is a class member or adopt or enforce any employment practice, condition or qualification which operates to discriminate against any class member as such. A class member shall be eligible for re-employment if she fulfills TWA's physical requirements (reasonably applied), medical examination, completion of retraining, and timely files the following described Re-Employment Application; provided, however, that no class member shall be eligible for re-employment who has been re-employed after June 1, 1972 who has been terminated for cause or who has resigned under circumstances which reasonably do not entitle her to be re-employed.

Each class member who desires re-employment shall in writing so indicate by providing the following information on a Re-Employment Application form to be prepared and distributed by plaintiffs' attorneys:

A. Current full name, name as of termination, social security number, and former TWA employee number

B. Home address and mailing address, including zip code

C. The last TWA base at which she was employed

D. Approximate date on which she was last employed by TWA

E. Preferences concerning location of new home base

F. The inclusive dates of each full-term and partial-term pregnancy and all other periods of disability

G. Financial information necessary for the calculation described in Section IV

Each class member desiring re-employment shall forward the said form to the attorneys for the plaintiffs, who shall then keep one copy for retention in their files and forward one copy to TWA. No class member shall be entitled to re-employment under this Agreement unless she completes and returns the aforesaid form to the attorneys for the plaintiffs within sixty (60) days after the date of the commencement of the hearing described in Section X; provided, however, that in the case of any person who is (a) named in the list of class members attached hereto but who does not receive notification of her rights because of an incorrect mailing address or (b) not named in the aforesaid list but who demonstrates diligence and entitlement to class membership, the deadline for filing the aforesaid form shall be 30 days prior to the commencement of TWA's last retraining class.

Within thirty (30) days after entry by the Court of an order (if any) determining the matters described in Section V.B, or within thirty (30) days expiration of the deadline for filing the Re-Employment Application, whichever is later, TWA shall prepare a special list showing the adjusted seniority date of each class member who

has applied for re-employment, one copy of which shall be supplied to the attorneys for the class representatives. Each class member's Re-Employment Application shall be acknowledged in writing by TWA by certified mail, addressed to the class member, advising her of her adjusted seniority date.

VII. TRIP PASSES FOR NON-RETURNING CLASS MEMBERS

Each class member who does not become re-employed shall be entitled to receive twelve (12) trip passes for use at any time or times during her lifetime. Each trip pass shall be good for travel on TWA for herself, her spouse or her child (provided that the child is (a) a dependent for IRS purposes and (b) is either under 21 or is a full time student under 23) from origin, point to destination and return to point of origin with enroute stopover privileges. The trip passes will be of the same priority class as trip passes for retired TWA hostesses (Class 9); provided, however, that such retired hostesses and other retired persons utilizing Class 9 passes shall have higher boarding priority.

VIII. IDENTIFICATION OF THE CLASS MEMBERS

The parties hereto agree that the list of class members attached hereto contains the names and last known addresses of all persons known by either side to be entitled to membership in the Plaintiff Class. In the event any person not listed on the attached list of class members files with the Court (together with service of a copy on the attorneys for the class representatives and the attorneys for TWA) a sworn petition setting forth sufficient facts to demonstrate diligence and entitlement to membership in the class, upon approval by the Court of said petition the person thus asserting class membership shall be entitled to all of the rights and benefits of this Agreement which are then reasonably available.

IX. RE-EMPLOYMENT PROCEDURES

For the purpose of retraining applicants for re-employment, TWA will conduct retraining classes. TWA will notify each applicant for re-employment (in writing, giving at least thirty (30) days' advance notice) of the commencement date of the retraining class which she is to attend. If the applicant fails within fifteen (15) days after the date of the notice either to accept the offer or provide a reasonable excuse for not accepting, she will forfeit her right to re-employment under this Agreement. Failure to accept any subsequent offer shall forfeit her right to re-employment unless it is due to temporary physical disability or other personal hardship; provided, however, any applicant who is excused from attending a retraining class because of personal hardship shall not accrue seniority for any purpose during the period beginning with the first day of the retraining class from which she was excused and ending on the first day of the retraining class which the applicant eventually successfully completes. Any class member who fails to meet the criteria described herein shall be ineligible to attend that class and she shall have sixty (60) days thereafter within which to meet the criteria. If she is deemed to have failed the medical examination, she may object to the determination made by the company doctor and obtain review thereof by petition to this Court, filed within sixty (60) days after receipt by her of TWA's written advice thereof.

Any class member who has been designated to attend the last retraining class to be conducted by TWA hereunder shall meet its weight standards and other qualifications no later than the first day of such retraining class or forfeit all rights of re-employment hereunder. All class members who have not accepted retraining for any reason prior to the last retraining class must accept retraining in such class or otherwise forfeit all rights of re-employment hereunder.

Each class member who successfully completes retraining will be permitted to select assignment to a flight attendant base (or bases), of her choice, at which a vacancy exists, provided that no flight attendant having greater seniority desires to fill such vacancy. If a class member is unable to obtain a base assignment which she desires, she will be assigned to fill a vacancy at any base selected by TWA.

Upon resumption of duties as hostess, each class member shall be provided with the required basic uniforms at TWA's expense.

X. SETTLEMENT PROCEDURES

This Settlement Agreement shall be submitted to the Court for its preliminary approval. If the Court grants preliminary approval and deems it a fit and proper Agreement for submission to the procedures described in Rule 23(e), F.R.C.P., plaintiffs' attorneys will draft all orders, notices and other papers necessary for compliance with the orders and directions of the Court and for the implementation of the procedures required under Rule 23, F.R.C.P., including a proposed form of notice to class members. All such papers shall be submitted to the attorneys for TWA at a reasonable time prior to submission to the Court, in the normal manner applicable to the presentation of any motion or application to the Court. The parties shall jointly file in the United States Supreme Court a motion and stipulation asking that the current pending petitions for writs of certiorari be held in abeyance during the settlement procedures, to be dismissed immediately after the Final Order Date.

Plaintiffs shall prepare an alphabetical list of all class members' names. One copy of the notice shall be sent by first-class U.S. mail to each class member.

The costs of notifying the class, including the preparation and reproduction of notice forms, class lists, pur-

chase of envelopes, postages, handling and mailing, shall be borne by plaintiffs, to be recovered only if and when the Court authorizes reimbursement out of the settlement funds.

After notice has been distributed to class members and after hearing has been held pursuant thereto, plaintiffs and TWA will apply to the Court for an order which approves this Settlement Agreement and dismisses these cases against TWA. Plaintiffs will seek an order which is final and appealable under Rule 54(b), F.R.C.P.

If the Court enters an order in accordance with the foregoing, the Final Order Date, as that term is used in this Agreement, shall be:

A. If no valid notice of appeal is filed within the time prescribed in Rule 4(a), Federal Rules of Appellate Procedure, the date on which the time for filing the notice of appeal expires thereunder.

B. If a valid notice of appeal is filed, the date on which such appeal is dismissed or, if the appeal is not dismissed, the date on which an order is entered which affirms the District Court's approval of the settlement plus the expiration of time or the occurrence of judicial events which render such order no longer subject to review or modification.

If the District Court enters an order disapproving of this Settlement Agreement and said order is not thereafter reversed or modified so that approval is otherwise obtained, this Agreement shall be null and void and shall have no force or effect.

XI. RETURN OF DOCUMENTS

Within (30) days after the Final Order Date, all documents now in the document depository which were obtained from TWA shall be returned to TWA.

XII. QUITTANCE PAPERS

Within seven (7) days after the Final Order Date, plaintiffs will deliver to TWA a general release in the form attached hereto, signed by one or more of the class representatives on behalf of all class members, witnessed by two of the lawyers who are of record representing plaintiffs in this case, and acknowledged by a notary public. In addition, TWA shall have the right to include on the check mailed to each member of the class a general release, and the execution of such release by the class member shall be a condition precedent to the right of the class member to receive any remuneration under this Settlement Agreement.

XIII. EXCLUSIVITY

Nothing contained in any other agreement or writing and no right or obligation which has arisen or accrued outside of this Settlement Agreement (including prior, current and future labor agreements) shall be deemed to modify, change or diminish the rights and obligations which arise under this Agreement.

XIV. ENFORCEMENT OF THIS AGREEMENT

The Order of the District Court approving this settlement shall incorporate and adopt by reference the terms of this Agreement. This Agreement shall be enforceable in the United States District Court for the Northern District of Illinois by virtue of the powers of said Court to enforce its orders and judgments, in addition to any and all other rights and remedies which plaintiffs may have under the common law and statutes of the United States.

Dated this 18th day of June, 1979.

GARDNER, CARTON & DOUGLAS,
Attorneys for
TRANS WORLD AIRLINES, INC.

BY: /s/ Laurence A. Carton

TRANS WORLD AIRLINES, INC.

BY: /s/ David J. Crombie

Ulrich V. Hoffman, an officer of Trans World Airlines, Inc., hereby certifies that the above-named signators have the authority to execute this agreement on behalf of Trans World Airlines, Inc.

/s/ Ulrich V. Hoffman

/s/ Pamela Dailing Giovanelli
PAMELA DAILING GIOVANELLI
Individually and on behalf of
the Plaintiff Class

This 21 day of June, 1979, PAMELA DAILING GIOVANELLI appeared before me, a person authorized to administer oaths in and for the County of Pima, State of Arizona, and acknowledged that she executed the foregoing agreement by affixing her signature thereto at the place indicated above.

/s/ Kenneth S. Walker

[SEAL]

/s/ Anne B. Zipes
ANNE B. ZIPES
Individually and on behalf of
the Plaintiff Class

This 25 day of June, 1979, ANNE B. ZIPES appeared before me, a person authorized to administer oaths in and for the County of West. State of New York, and acknowledged that she executed the foregoing agreement by affixing her signature thereto at the place indicated above.

by /s/ Doris J. Allen
DORIS J. ALLEN
Notary Public

[SEAL]

/s/ Pat Santini
PAT SANTINI
Individually and on behalf of the Plaintiff Class

This 19th day of June, 1979, PAT SANTINI appeared before me, a person authorized to administer oaths in and for the County of Marin, State of California, and acknowledged that she executed the foregoing agreement by affixing her signature thereto at the place indicated above.

/s/ Jean Cox-Treverton

[SEAL]

One of the Attorneys for Plaintiffs

One of the Attorneys for Plaintiffs

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PETITION FOR INTERVENTION

[Filed July 25, 1979]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Title omitted in printing]

PETITION FOR INTERVENTION

Comes now the Intervenor, the Independent Federation of Flight Attendants, and today files this Petition for Intervention. In support of its Petition, Intervenor states:

1. Independent Federation of Flight Attendants (IFFA) is an unincorporated association with its principal address at 630 Third Avenue, New York, New York, and is a labor organization, national in scope, representing for purposes of collective bargaining flight attendants employed by air carriers under the provisions of the Railway Labor Act, Title 45 U.S.C. Sec. 151, *et seq.* On April 1, 1977 IFFA was certified by the National Mediation Board as the duly designated and authorized representative of all flight attendants employed by Trans World Airlines, Inc. (TWA), and ever since that date has been the exclusive bargaining representative of all flight attendants employed by TWA for all matters pertaining to wages, hours, and working conditions, including the seniority and seniority rights of such flight attendants arising solely by virtue of the Collective Bargaining Agreement in effect between IFFA and TWA.

2. Intervenor represents the flight attendants currently employed by the defendant.

3. Representatives of the plaintiff class and defendant have reached a tentative settlement of these actions.

4. If the proposed settlement is put into effect, approximately 430 individuals will be offered reinstatement to positions within the bargaining unit represented by Intervenor.

5. As part of the settlement plaintiffs seek both retained and accrued seniority.

6. The United States Court of Appeals for the Seventh Circuit has ruled in this case that approximately 400 of the 430 defendants are entitled to no relief on their claims against defendant; however, defendant has nonetheless agreed to settle this case by offering reinstatement to all class members, including these 400 individuals.

7. The job seniority of a flight attendant is a valuable property right, which greatly affects the rights, privileges, and general working conditions of the flight attendant.

8. If all plaintiffs are reinstated with full seniority, the rights of many of Intervenor's members will be impaired.

9. Neither plaintiffs nor defendant sought Intervenor's consent or input in conducting settlement negotiations.

10. No party has attempted to join Intervenor as an additional party to this action pursuant to Rule 19 of the Federal Rules of Civil Procedure, despite the fact that in the absence of Intervenor, complete relief cannot be accorded; and that defendant may be subjecting itself to inconsistent or multiple obligations.

11. The proposed settlement is not valid and cannot be put into effect without the consent of the Intervenor.

12. Approval by the court of a settlement agreement between plaintiffs and defendants which reinstates all plaintiffs with full seniority, without the consent of Intervenor and its members, and without right of trial, violates the rights of Intervenor and its members to due process of law.

13. It would not be just and proper for the court to approve a settlement reinstating all plaintiffs with full seniority.

14. The proposed settlement allows defendant to settle these actions, but unfairly and improperly forces Intervenor and its members to bear the burden of this settlement.

15. The proposed settlement agreement raises many unanswered questions which directly affect the rights of Intervenor and its members.

16. The proposed settlement agreement between plaintiff class and defendant TWA improperly restricts and diminishes legitimate seniority rights and expectations of TWA's male and female incumbent flight attendants who are not members of the proposed class in violation of Sections 703(h) and 703(j) of the Civil Rights Act of 1964.

17. The proposed settlement agreement between defendant TWA and plaintiff class, to the exclusion of and without approval of Intervenor, is prohibited by and in violation of the Railway Labor Act, Title 45 U.S.C. Sec. 152, Sixth and Seventh and Sec. 156, all made applicable to carriers by air, Sec. 181.

18. The court lacks jurisdiction to make any orders in regard to the claims of those members of the plaintiff class whose claims have been held jurisdictionally insufficient by the Seventh Circuit Court of Appeals.

WHEREFORE, Intervenor prays that: the proposed settlement not be approved insofar as it provides for reinstatement with competitive or occupational or union seniority; the court direct that Intervenor be included in any further settlement negotiations insofar as any proposed settlement may infringe upon the rights of Intervenor and its members; the court rule that it has no jurisdiction to make any orders regarding the claims of

those class members whose claims have been found to be jurisdictionally deficient by the Seventh Circuit Court of Appeals; and, if despite the above the court approves the proposed settlement agreement, the court order that plaintiffs be reinstated without occupational, competitive or union seniority.

Respectfully submitted,

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By /s/ James L. Coghlan
JAMES L. COGHLAN

/s/ Thomas J. Reed
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By /s/ William A. Jolley
WILLIAM A. JOLLEY

/s/ Scott A. Raisher
SCOTT A. RAISHER

/s/ Steven A. Fehr
STEVEN A. FEHR

Attorneys for Intervenor IFFA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 2071

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, PAMELA DAILING, SADIE SUE LAKE, PAT SANTINI, VIRGINIA HIRT and BONNIE YODER,

Plaintiffs,

vs.

TRANS WORLD AIRLINES, INC.,

Defendant.

No. 74 C 2063

ANNE B. ZIPES, FRANCES M. SWIFT, *et al.*,

Plaintiffs,

vs.

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO and TRANS WORLD AIRLINES, INC.,

Defendants.

AMENDMENT TO SETTLEMENT AGREEMENT

The Settlement Agreement which has been heretofore entered into between Trans World Airlines, Inc., and the undersigned representatives of the class is hereby amended as follows:

Section V.B. shall provide as follows:

It is agreed that the total amount of seniority and credit for length of service (both accrued and retroactive) for the compensation period will be determined by the Court in its discretion, pursuant to the provisions of Section 706(g), and all other applicable provisions of law, without contest or objection by TWA. The Court's determination will be applied retroactively for all class members who are re-employed after the date of this Agreement but prior to said determination. The class representatives and their attorneys agree and covenant diligently to present to the Court the questions and issues involved in the Court's determination of seniority and credit for length of service within a reasonable time after the entry of an order approving the settlement.

Dated this 22 day of August, 1979.

/s/ Anne B. Zipes
ANNE B. ZIPES
Individually and on behalf of
the Plaintiff Class

Dated this 17 day of August, 1979.

/s/ Pat Santini
PAT SANTINI
Individually and on behalf of
the Plaintiff Class

Dated this 22nd day of August, 1979.

GARDNER, CARTON & DOUGLAS,
Attorneys for
TRANS WORLD AIRLINES, INC.

BY: /s/ Laurence A. Carton
LAURENCE A. CARTON
On behalf of
Trans World Airlines, Inc.

/s/ Kevin M. Forde
KEVIN M. FORDE
One of the Attorneys for
Sub-Class A

/s/ Aram A. Hartunian
ARAM A. HARTUNIAN
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UNITED STATES DISTRICT COURT
NORTHEASTERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 2071

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, PAMELA DAILING, SADIE SUE LAKE, PAT SANTINI, VIRGINIA HIRT and BONNIE YODER,

Plaintiffs,

v.

TRANS WORLD AIRLINES, INC.,

Defendant.

74 C 2063

ANNE B. ZIPES, FRANCIS M. SWIFT, *et al.*,

Plaintiffs,

vs.

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO and TRANS WORLD AIRLINES, INC.,

Defendants.

ORDER

Union-Intervenor's objection to this court's jurisdiction and authority to approve the proposed settlement agreement is hereby overruled. The crux of the Union argument is that the recent Seventh Circuit opinion entered in this litigation and entitled *In Re Consolidated Pretrial*

Proceedings, 582 F.2d 1142 (7th Cir. 1979), wherein the court held that the claims of all members of Subclass B were jurisdictionally defective, represents a litigated final judgment in this case which is legally binding on this court. Thus, applying the jurisdictional portion of the *Consolidated* decision to the case at bar, the Union contends that this court is without authority to exercise its discretion in deciding whether to approve that part of the proposed settlement agreement which allows for an award of accrued and/or retroactive "competitive" seniority to members of Subclass B.

For the reasons stated below, the court finds that the *Consolidated* decision does not serve to bar this court from exercising its authority over those portions of the proposed settlement agreement pertaining to members of Subclass B.

A federal appellate court opinion has no legal relevance or impact upon lower court proceedings until it ripens into a final judgment formally communicated to the district court through the issuance of the court of appeals' mandate and opinion in accordance with Rule 41 (a), F.R.A.P. *Bailey* v. *Henslee*, 309 F.2d 840 (8th Cir. 1962) (*see also, Alphin* v. *Henson*, 552 F.2d 1033 (4th Cir. 1977), wherein the court held that prior to the issuance of its mandate a court of appeals' decision was not final and could be amended to conform to then existing law.

Significantly, no Seventh Circuit mandate has issued in the *Consolidated* appeal as to the plaintiff class members.[1] Pursuant to the provisions of Rule 41(b), F.R.A.P., the plaintiff class requested and was granted a stay of mandate pending final disposition by the Su-

[1] Although the court of appeals mandate has issued as to defendant T.W.A., that does not "finalize" those portions of the opinion relating to the claims of the Subclass B members.

preme Court of its petition for certiorari.[2] Contrary to the Union's assertion, the filing of the *Consolidated* opinion with the Clerk of the Seventh Circuit does not constitute a final judgment order, and this court is therefore not presently forbidden from exercising its jurisdiction over the claims of Subclass B members. To paraphrase Mr. Justice Stevens in *United Airlines* v. *Evans*, 431 U.S. 533 (1977), the mere entry of the *Consolidated* decision is an event from which no legal consequences flow until such time as the requisite mandate issues.

The court's decision today is further supported by the fact that the legal effect of a stay of mandate is to maintain and continue the status quo between the parties to the appeal. *Algonquin Gas Trans. Co.* v. *Township of Bernards*, 112 F.Supp. 86, 90 (D.C. N.J. 1953). That is to say that neither party can reap any benefit nor incur any legal detriment as a result of the decision until the mandate issues. Implicit in the maintenance of the status quo is the judicial recognition that the parties to the controversy are free to settle their differences prior to the issuance of the mandate. To hold differently would result in the plaintiff class and T.W.A. being forced against their will to continue a legal battle before the Supreme Court in a winner-take-all contest which neither party desires to risk. Such a harsh result certainly can not be intended by the court of appeals when the stay of mandate is granted.

The remaining objections raised by the Union address themselves to the merits of the proposed settlement agreement and need not be considered at this time.

ENTER:

/s/ Stanley J. Roszkowski
STANLEY J. ROSZKOWSKI
Judge

Dated: Sep. 14, 1979

[2] Per order dated June 4, 1979, the Supreme Court deferred consideration of plaintiff class' certiorari petition pending approval of the proposed settlement agreement.

EXCERPTS FROM THE 1978 IFFA-TWA COLLECTIVE BARGAINING AGREEMENT (FILED AS EXHIBIT I-U #14 ON OCTOBER 3, 1979)

ARTICLE 10

SENIORITY GENERAL

* * * *

(B) Seniority shall govern all employees in case of furlough due to reduction in forces, re-employment after furlough, (subject to Article 12(G)) choice of vacancies, and preference of assignment to equipment, provided the employee is deemed sufficiently qualified by the Company for the operation involved, except that the term "sufficiently qualified" as used herein shall be applied the same as it was on July 31, 1969. In addition, qualifications or lack thereof on any equipment will not be used as a basis for denying seniority in cases of bidding or reduction in force. If a Flight Attendant bids and is awarded a line of time on equipment on which such Flight Attendant is not qualified, the provisions of Articles 6-A(F) or 6-B(G) will apply during such training. In the event a senior employee is not considered sufficiently qualified, the Company will, upon request, discuss the matter with the employee and furnish reasons therefor, in writing.

* * * *

(F) Any employee who resigns or who is dismissed from the services of the Company shall thereupon forfeit all previously accrued seniority, and the employee's name will be removed from the seniority list(s).

* * * *

ARTICLE 12

REDUCTION IN FORCE AND RECALL

* * * *

(F) Employees furloughed due to a reduction in force on return to duty within three (3) years from the furlough date, shall be allowed, for seniority purposes not for purposes of determining future pay rate, all time accrued prior to returning to duty. At the end of three (3) years after the date of furlough, the furlough shall expire and the employee's name shall be removed from the seniority list(s).

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 2071

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, *et al.*,
Plaintiffs,

v.

TRANS WORLD AIRLINES, INC.,
Defendants.

No. 74 C 2063

ANNE B. ZIPES, *et al.*,

v.

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO and TRANS WORLD AIRLINES, INC.,
Defendants.

ORDER APPROVING SETTLEMENT AND DISMISSING ACTIONS

The court has considered the proposed Settlement Agreement, as amended, for the compromise of these actions and has considered the written and oral presentations of the parties under Rule 23(e), F.R.C.P. The court finds that proper notice of the proposed settlement and the hearings thereon was given to the members of plaintiff class and Subclasses A and B; and that no class member objected to the settlement. The court also finds that the settlement agreement is fair, reasonable, and adequate for the parties and Subclasses A and B.

Accordingly, it is ordered, that the Settlement Agreement, as amended, is approved and the actions are dismissed. The court finds, pursuant to Rule 54(b),

F.R.C.P., that no just reason exists to delay enforcement of or appeal from this Order.

The court retains jurisdiction:

(a) to determine the total amount of seniority and credit for length of service (both accrued and retroactive) for re-employed class members as provided in Section V B of the Settlement Agreement as amended,

(b) to enforce the terms of the Settlement Agreement and the orders entered herein, including this Order,

(c) to adjudicate any disputes which may arise concerning the interpretation of any part of the Settlement Agreement, including matters relating to the claims of eligibility of class members, and

(d) to determine the amounts of attorneys' fees and reimbursement of costs and expenses which may be awarded to plaintiffs' lawyers and the representatives of the class.

ENTER:

/s/ Stanley J. Roszkowski
STANLEY J. ROSZKOWSKI
Judge
United States District Court

Dated November 8, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 2071

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, *et al.*,
Plaintiffs,

v.

TRANS WORLD AIRLINES, INC.,
Defendant.

No. 74 C 2063

ANNE B. ZIPES, *et al.*,
Plaintiffs,

v.

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO and TRANS WORLD AIRLINES, INC.,
Defendants.

ORDER AWARDING SENIORITY

The court having considered the evidence, testimony and briefs which have been submitted in connection with the issue of seniority, pursuant to Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(g) and Section V of the Settlement Agreement, as amended, and the court finding that full restoration of retroactive seniority will not have an unusual adverse impact upon currently employed flight attendants in a manner which

is not typical of other Title VII cases, it is ordered that each class member who is now employed as a TWA flight attendant or who will hereafter become employed as a flight attendant by TWA under the Settlement Agreement shall be credited with the amount of union (occupational) seniority to which she was entitled on the date on which her employment was terminated, plus credit for such seniority for the "compensation period", as defined in the Settlement Agreement (at page 3), less the deductions provided therein (at p. 8), the terms of which are incorporated by reference and are adopted as part of this Order.

The court having approved the Settlement Agreement in a separate order, it is ordered that this case be, and is hereby, dismissed. The court finds, pursuant to Rule 54(b), F.R.C.P., that no just reason exists to delay enforcement of or appeal from this Order.

However, this court hereby retains jurisdiction:

(a) to enforce the terms of the Settlement Agreement and the orders entered herein, including this Order,

(b) to adjudicate any disputes which may arise concerning the interpretation of any part of the Settlement Agreement, including matters relating to the claims of any eligibility of class members, and

(d) to determine the amounts of attorneys' fees and reimbursement of costs and expenses which may be awarded to plaintiffs' lawyers and the representatives of the class.

ENTER:

/s/ Stanley J. Roszkowski
STANLEY J. ROSZKOWSKI
Judge
United States District Court

Dated Nov. 8, 1979

PETITIONER'S

BRIEF

(4)

No. 88-608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Petitioner,

v.

ANNE B. ZIPES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR PETITIONER

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QUESTION PRESENTED

May a court award attorney's fees in favor of plaintiffs and against a labor union-intervenor pursuant to § 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), under the same standard by which fees are awarded in favor of prevailing plaintiffs and against defendants found to have violated federal law, when:

(a) the union-intervenor was neither accused of nor found to have engaged in any illegal acts, and

(b) the sole purpose of the union's intervention was to object (unsuccessfully) to a proposed settlement of plaintiffs' claims which would modify and/or override provisions of the union's collective bargaining agreement and endanger the job security of employees in the bargaining unit, not parties to the litigation, whom the union has an obligation to represent.

PARTIES

Petitioner, Independent Federation of Flight Attendants ("IFFA"), is an unincorporated labor organization designated as the bargaining representative under the Railway Labor Act of Trans World Airlines, Inc. ("TWA") employees in the flight attendant craft or class. Plaintiffs-Respondents Anne B. Zipes, et al., are a class of TWA flight attendants who were terminated by TWA on account of pregnancy between July of 1965 and October of 1970.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is officially reported at 846 F.2d 434, unofficially reported at 46 FEP 1503, and reprinted in the Appendix to the Petition at *Pet. App. 1a.*[1] The opinion of the United States District Court for the Northern District of Illinois is officially published at 640 F.Supp. 861, unofficially published at 46 FEP 1497, and reprinted at *Pet. App. 24a.* A September 18, 1986 Order

[1] Citations to the Appendix to the Petition for Certiorari will be denoted as "Pet. App. ——", and citations to the Joint Appendix will be "J.A. ——".

of the District Court modifying its previous judgment has not been published but is reprinted at *Pet. App. 38a.*[2]

JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1988. A timely Petition for Rehearing with Suggestion for Rehearing *In Banc* was filed on May 19, 1988. The Petition for Rehearing was denied on July 22, 1988, with four Circuit Judges voting to grant rehearing in banc, and one not participating. (Pet. App. 22a). A timely Petition for *Certiorari* was filed on October 11, 1988, and granted on January 17, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This Petition involves Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, specifically Section 706(k), 42 U.S.C. § 2000e-5(k), which provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for the costs the same as a private person.

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[2] There have been seven Seventh Circuit opinions issued in this litigation. In chronological order, the first six are: *ALSSA v. American Airlines, Inc.*, 455 F.2d 101 (7th Cir. 1972) ("ALSSA I"); *ALSSA v. American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973), *cert. denied,* 416 U.S. 993 (1974) ("ALSSA II"); *In re Consolidated Pretrial Proceedings in the Airline Cases,* 582 F.2d 1142 (7th Cir. 1978) ("Consolidated"); *ALSSA v. TWA,* 630 F.2d 1164 (7th Cir. 1980) ("ALSSA III"); *ALSSA v. TWA,* 713 F.2d 319 (7th Cir. 1983) ("ALSSA IV"); and *Freedman v. ALSSA,* 730 F.2d 509 (7th Cir.), *cert. denied,* 469 U.S. 899 (1984). This litigation has also produced one Supreme Court opinion, *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982) ("Zipes I").

STATEMENT OF THE CASE

A. Introduction

This case presents the question of whether, pursuant to Section 706(k) of Title VII of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(k)], innocent third parties who are caught in the cross-fire between plaintiffs and defendants should, for attorney's fees purposes, be judged under the same standard applied to defendants found to have violated federal law.

Petitioner Independent Federation of Flight Attendants ("IFFA") is a labor union which has been certified pursuant to the Railway Labor Act (45 U.S.C. § 151, *et seq.*) ("RLA") to represent the flight attendants in the employ of Trans World Airlines, Inc. ("TWA"). IFFA, which was never accused of wrongdoing, intervened in this case only to object to a proposed settlement between Plaintiffs and TWA which would supersede its contract with TWA, and also abridge the seniority rights of IFFA's members. The District Court nonetheless chose to award attorney's fees against IFFA "under the same standard applicable to defendants who have violated their employees' civil rights". (Pet. App. 19a). The court did so because it believed that attorney's fees are to be "almost automatically" awarded to prevailing plaintiffs, merely because they are plaintiffs. (Pet. App. 32a). In so ruling, the District Court apparently took no cognizance of the undisputed facts that (1) IFFA's predecessor union filed this case, and forced TWA to abandon its illegal policy; (2) the Court of Appeals had subsequently removed the union as class representative because it believed the union had a conflict of interest between the Plaintiffs and the incumbent employees, the latter group being one to whom the union owed a legal duty; (3) Plaintiffs' (subsequent and) current counsel had already been paid more than One Million Two Hundred Fifty Thousand Dollars ($1,250,000) from the Three Million

Dollar ($3,000,000) settlement fund provided by TWA; and (4) IFFA intervened solely because it believed the seniority granted pursuant to the settlement would not only have an adverse impact on the bargaining unit as a whole, but also because IFFA feared (correctly) that the Settlement Agreement might actually cost some incumbent employees their jobs. A divided Seventh Circuit Panel affirmed (Pet. App. 1a), and the Seventh Circuit denied a request for rehearing *in banc*, although four judges voted to grant rehearing. (Pet. App. 22a).

In order that the Court be able to understand the extraordinary circumstances which led to IFFA being assessed attorney's fees in excess of $180,000, we provide the following detailed, chronological history of this lengthy, complex and fascinating litigation.

B. Proceedings Prior To The (Second) Settlement

For some years prior to July 2, 1965, the effective date of Title VII of the Civil Rights Act of 1964, TWA had engaged in a policy of terminating all flight attendants who became mothers. On either May 31 or June 1, 1970, the Airline Stewards and Stewardesses Association ("ALSSA"), the union then representing TWA's flight attendants, filed charges with the Equal Employment Opportunity Commission ("EEOC") contending that this practice was illegal sex discrimination under Title VII. *ALSSA v. American Airlines, Inc.*, 455 F.2d 101, 103 (7th Cir. 1972) ("ALSSA I")[3]; *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142, 1147 (7th Cir. 1978) ("Consolidated"). On August 18, 1970, the union filed this case as a class action. *ALSSA v. American Airlines, Inc.*, 490 F.2d 636, 637 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974) ("ALSSA II"); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 388 (1982) ("Zipes I"). In October of 1970, TWA abandoned its "no-motherhood" policy pursuant to a new collective bargaining agreement with ALSSA. *ALSSA II*, 490 F.2d at 638.

[3] For a time this case was consolidated with a similar action filed against American Airlines.

In 1971, TWA entered into a tentative settlement with ALSSA and the other class representatives. Under this settlement, TWA would offer reemployment to all flight attendants terminated on account of pregnancy since July 2, 1965. The settlement did not call for backpay, and allowed each flight attendant to return with the seniority accrued as of the time of her termination. At this point, the EEOC sought to intervene, but both the District Court and Seventh Circuit rejected that request. *ALSSA I*, 455 F.2d 101.

Counsel for ALSSA, who was also serving as lead counsel for the class, testified that he supported the settlement in significant part because he believed (accurately) that "about 90% of the members of the class faced a serious legal question as to recovery because they had been terminated long before any complaint was filed with the EEOC . . ." . *ALSSA II*, 490 F.2d at 639-40. Thus, he feared that the great majority of the class could have their claims held to be time-barred under the 90-day time limit for filing a charge with the EEOC then contained in 42 U.S.C. § 2000e-5(d).[4]

The District Court approved the settlement. Several disenchanted class members appealed however, and the Seventh Circuit reversed, holding that ALSSA was an inadequate class representative due to what the Seventh Circuit perceived as a conflict of interest between the class members and junior incumbent employees who were not members of the class but to whom the union owed a duty of fair representation. Pet. App. 2a-3a; *ALSSA II*, 490 F.2d at 638, 640, 642; *Zipes I*, 455 U.S. at 388.

[4] The time limit was later expanded to 180 days and is now contained in 42 U.S.C. § 2000e-5(e).

Accordingly, the settlement was not consummated, ALSSA was removed as class representative (*ALSSA II*, 490 F.2d at 643) and was replaced by some of the class members who had successfully appealed the approval of the settlement,[5] and the case proceeded. In 1974, TWA sought and was granted leave to file an amended answer specifically setting forth the statute of limitations as an affirmative defense. (Pet. App. 47a). In October of 1976, the District Court granted partial summary judgment in favor of Plaintiffs and against TWA, holding that TWA's "no-motherhood" policy was indeed illegal. *Consolidated*, 582 F.2d at 1144. That same month the District Court also denied TWA's motion to exclude from the class all individuals terminated more than 90 days from the date ALSSA first filed a charge with the EEOC. The court held that TWA had engaged in a "continuing violation", and that the claims of *all* class members were therefore timely. *Consolidated*, 582 F.2d at 1147; *Zipes I*, 455 U.S. at 389.

The Seventh Circuit affirmed on the legality of the policy but reversed on the timeliness issue. *Consolidated*, 582 F.2d 1142. The Court of Appeals held that TWA had *not engaged in a continuing violation*, and that therefore the claims of approximately 92% of the putative class were time-barred. *Id.* at 1149-50.

The Court of Appeals then went on to address Plaintiffs' secondary argument, that TWA had waived the timeliness defense by not specifically setting it forth in its original answer. While the court indicated that it found Plaintiffs' waiver argument to be questionable,[6] the

[5] It was at this point that Plaintiffs' current counsel, who had brought the appeal in *ALSSA II*, became counsel for the class.

[6] It seems highly doubtful that Plaintiffs ever could have prevailed on the waiver theory. First, in its original Answer, TWA stated that it was without sufficient knowledge to answer Plaintiffs' contention as to when a charge was filed with the EEOC. Second,

Seventh Circuit held that it need not address the waiver argument because it believed that the Title VII time limit was a "jurisdictional prerequisite" which could not be waived. *Id.* at 1151. In so ruling, the Seventh Circuit relied on statements by the Supreme Court characterizing the 90-day filing requirement as a "jurisdictional prerequisite." *Id.*[7]

C. The (Second) Settlement

In the aftermath of the *Consolidated* opinion, the Plaintiffs sought *certiorari* solely on the question of whether the Title VII time limit was jurisdictional or subject to waiver (No. 78-1545); Plaintiffs did *not* seek review of the Seventh Circuit's ruling that TWA had not engaged in a "continuing violation" and that most Plaintiffs' claims were therefore time-barred. TWA cross-petitioned seeking review of the holding that its "no-motherhood" policy had been illegal. (No. 78-1549). While these petitions were pending however, Plaintiffs and TWA reached agreement upon another settlement. The Court granted joint motions to defer consideration of the *certiorari* petitions (442 U.S. 916) "pending completion of the settlement proceedings in the District Court". *Zipes I*, 455 U.S. at 390.

by 1968, the Seventh Circuit was already on record as characterizing the Title VII time limit as "jurisdictional". *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357, 359 (7th Cir. 1968). Thus, TWA reasonably could have believed the Seventh Circuit thought the timeliness defense could not be waived (which it in fact did). Third, TWA *did* raise the defense in its Amended Answer. Under such circumstances, the case law is clear that the defense is to be allowed unless Plaintiffs can show prejudice from the *delay*, particularly where the defense can be gleaned from the face of the complaint, as it certainly could here. *Pierce v. County of Oakland*, 652 F.2d 671 (6th Cir. 1981); *Rivera v. Anaya*, 726 F.2d 564 (9th Cir. 1984).

[7] *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 557, n.9 (1977); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973).

The Settlement Agreement (J.A. 7) for the first time divided the Plaintiffs into two subclasses: Subclass A, consisting of the approximately 30 women whose claims were timely in the opinion of the Seventh Circuit; and Subclass B, consisting of the approximately 400 women whose claims were untimely pursuant to the *Consolidated* ruling. (J.A. 8). TWA provided a settlement fund of Three Million Dollars ($3,000,000), of which One Million Five Hundred Thousand Dollars ($1,500,000) would be paid to each subclass. In addition, attorney's fees for Plaintiffs' counsel were to be deducted by the court from the settlement fund. (J.A. 10).

All class members were to be offered reemployment as flight attendants, but that employment would only begin when a "vacancy exists". (J.A. 18). Plaintiffs and TWA "agreed" that each plaintiff who accepted reemployment would receive full retroactive competitive seniority from her original date of hire through the date TWA signed the Settlement Agreement (and thus, pursuant to the Settlement Agreement itself, class members would not accrue seniority between the date TWA signed the Settlement Agreement and the date of rehire). However, the Settlement Agreement provided that "in the event of the timely objection of any interested person", seniority would be determined by the District Court. (J.A. 13).

The Settlement Agreement also, of course, contained a provision whereby TWA disclaimed all liability. (J.A. 9). In addition, it was made clear that TWA would not be liable to anyone for any attorney's fees other than what could be deducted from the settlement fund. (J.A. 11). And, finally, but most importantly, the Settlement Agreement contained an "exclusivity" provision stating that the settlement superseded any other "right or obligation" to which the paries might be subject, specifically "including prior, current and future labor agreements". (J.A. 20).

The Notice to Class Members which accompanied the Settlement Agreement stated clearly that the Plaintiffs' counsel intended to seek "up to $1,250,000 plus expenses, to be divided equally between the two subclasses", from the settlement fund. (See the Notice to Class Members filed on June 27, 1979, which was also reprinted in the Joint Appendix to Nos. 78-1545 and 80-951, Vol. II, pp. 5, 9). Counsel for the Plaintiffs and TWA supplied a copy of that Notice and of the Settlement Agreement to counsel for IFFA. Having been virtually invited to intervene, IFFA did so in July of 1979.

D. The Litigation Over The (Second) Settlement

IFFA had come into existence on April 1, 1977, when the *Consolidated* decision was pending. After receiving a copy of the Settlement Agreement, and reviewing the Seventh Circuit opinions in *ALSSA II* and *Consolidated*, IFFA moved to intervene. There were no objections and IFFA's Motion was promptly granted. As is demonstrated by the Petition for Intervention (J.A. 23), IFFA made it clear from the beginning that its sole concern was the impact a grant of retroactive competitive seniority would have on the bargaining unit. IFFA feared that such a grant of seniority would not only have a significant adverse impact upon the bargaining unit as a whole, but also might actually cost some incumbents their jobs.[8]

Throughout the litigation over the settlement IFFA raised two basic arguments: (1) in view of the Seventh

[8] The Settlement Agreement did not require TWA to affirmatively furlough incumbents in order to create vacancies for the returning Plaintiffs. However, if the incumbents were furloughed prior to the time the Plaintiffs were reemployed, when vacancies subsequently arose those vacancies were to be allocated on the basis of seniority, which meant that (with a grant of seniority) those vacancies would go not to the furloughees but to the class members. (See the Deposition of David Crombie, then TWA Senior Vice-President, taken on September 27, 1979 at pp. 33-34, and also reprinted in the Joint Appendix to Nos. 78-1545 and 80-951, Vol. II, at pp. 159-60). That, in fact, is precisely what happened.

Circuit's finding that there was no subject matter jurisdiction over the claims of the members of Subclass B, the District Court had no power to approve settlement of those claims, override the collective bargaining agreement on behalf of those Plaintiffs, and grant them seniority; and (2) in any event, under these facts the court should not override the collective bargaining agreement and grant seniority on behalf of Plaintiffs who had not won but instead had settled very questionable claims, particularly where such action by the court would have an adverse impact upon the incumbent employees.

The District Court rejected IFFA's jurisdictional arguments in a short opinion issued on September 14, 1979. Judge Roszkowski found the *Consolidated* opinion to be insignificant for the reason that the final mandate had not issued, and therefore held that he had subject matter jurisdiction over the claims of Subclass B despite the *Consolidated* ruling. (J.A. 30). Following a one-day evidentiary hearing on October 3, 1979, Judge Roszkowski overruled IFFA's other objections, approved the Settlement Agreement, and granted to Plaintiffs the full retroactive competitive seniority available under the Settlement Agreement in orders dated November 8, 1979. In so ruling, the District Court apparently accepted the contentions of Plaintiffs and TWA that the Plaintiffs could be absorbed into the workforce as a result of normal attrition in less than half a year, and rejected IFFA's (necessarily speculative) assertion that the airline industry (and TWA in particular) was about to enter a recession which would cause a significant shrinkage of the TWA flight attendant workforce. (J.A. 35-38). Ironically, however, just days before the District Court issued that order, TWA announced its first furlough of 164 incumbent flight attendants.[9]

[9] See IFFA's Motion to Re-Open the Record for the Purpose of Introducing Exhibit No. 27, filed on October 17, 1979, and granted on November 28, 1979, which was reprinted in the Joint Appendix to Nos. 78-1549 and 80-951, Vol. II, pp. 191-211.

The Seventh Circuit affirmed, but used a very different rationale. *ALSSA v. Trans World Airlines, Inc.*, 630 F.2d 1164 (7th Cir. 1980) ("ALSSA III").[10] The court held that the "principles favoring settlements" were so important that the court had jurisdiction to act regardless of whether it had subject matter jurisdiction. *Id.* at 1169. In rejecting IFFA's other arguments, the Seventh Circuit specifically relied upon the (speculative) record evidence that "providing positions for these reinstated (plaintiffs) would normally be possible as a result of normal attrition of workers in less than half a year". *Id.*

IFFA filed for *certiorari* (No. 80-951), and its petition was granted on March 8, 1981. At the same time, however, the Court, acting on its own initiative, granted the petitions of Plaintiffs and TWA which had been held in abeyance (Nos. 78-1545 and 78-1549).[11] 450 U.S. 979 (1981).[12]

Following three-sided briefing and argument, the Supreme Court issued its ruling *sub nom. Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). The Court chose not to answer the question presented by IFFA in No. 80-951 regarding whether a district court had power to approve a settlement and issue orders which affected third parties, in the face of a decision by its court of appeals that subject matter jurisdiction was lacking; instead, the Court held that the Seventh Circuit had been

[10] For some reason ALSSA's name continued to remain on the caption of court-issued documents even years after it had not only been removed from the litigation but also had ceased to exist.

[11] TWA's cross-petition (No. 78-1549) was subsequently removed from the argument docket (451 U.S. 980), and eventually dismissed as improvidently granted (*Zipes I*, 455 U.S. at 392, n.5).

[12] It is safe to say that neither Plaintiffs nor TWA *wanted* their petitions to be granted at this point. In fact, Plaintiffs and TWA later attempted to get the Court to dismiss their petitions. *See*, 451 U.S. 980 (1981).

wrong (in *Consolidated*) when it had ruled that the Title VII time limit was not subject to waiver and estoppel. The Court ruled that that the time limit was not jurisdictional and *could* be waived.[13] Accordingly, the Court held that there was subject matter jurisdiction to approve the settlement; and thus, the jurisdictional issue posed by IFFA (on which *certiorari* was granted) was never decided. 455 U.S. at 393, n.8. The orders approving the settlement and granting seniority were therefore affirmed by the Court, albeit for entirely different reasons than those used by the lower courts.[14]

[13] Although the Court held that the time limit theoretically *could* be waived, neither the Court nor either of the lower courts ever determined whether TWA in fact *had waived* the timeliness defense (much less whether such a waiver could be binding on third parties). The Seventh Circuit specifically acknowledged this point in a post-*Zipes* opinion. *Freedman*, 730 F.2d at 512, n.5. Accordingly, the statement in *Zipes I* that the District Court's summary judgment order "that found classwide discrimination remains intact and is final", is troubling. 455 U.S. at 399. The District Court's order on the legality of TWA's "no-motherhood" policy was intact and final; but the District Court's order that the claims of all Plaintiffs were timely *was not*. In fact, the Seventh Circuit's determination that TWA had not engaged in a continuing violation was final; and thus the claims of all Subclass B members were time-barred just as surely as those of the plaintiff in *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 559 (1977), subject only to Plaintiffs' right to litigate the waiver issue, an issue which it seems Plaintiffs would likely have lost had it ever been litigated. See note 6, *infra*. Indeed, TWA had spent seven pages of its Supreme Court brief explaining why there could be no waiver, while Plaintiffs pleaded with the Court not to decide the waiver issue. (*See*, TWA's Brief in Nos. 78-1545 and 80-951 at pp. 43-49, and also the Reply Brief for the Plaintiff Class at pp. 6-7).

[14] Justice Powell issued a concurring opinion (in which Chief Justice Burger and Justice Rehnquist joined) in order to stress that "a timely charge as well as a violation of Title VII, is a prerequisite to disturbing rights under a bona fide seniority system . . ." (455 U.S. at 401), as held in *United Air Lines, Inc. v. Evans*. Justice Powell went on to state that, "This case has been in litigation since 1970, and in view of its complexity it is difficult to be certain as to 'what happened and when'. I believe, however, that one can conclude that the requirements of *Evans* were met." 455 U.S. at 402. In addition, Justice Powell made statements which seem to adopt many of the arguments IFFA had raised. 455 U.S. at 401, n.1.

E. The Impact Of The Settlement

The furloughs of flight attendants which occurred in October of 1979 were just the beginning. Between that month and July of 1982 TWA furloughed nearly 600 incumbent flight attendants (and recalled none). (Pet. App. 41a). TWA engaged in no flight attendant hiring, and had no flight attendant vacancies, from May of 1979 until mid-1983. When vacancies finally occurred, of course, those vacancies were assigned in the first instance to the returning Plaintiffs (because of their seniority) and not to the furloughees; and many of the furloughees were never recalled.[15] Pursuant to Article 12(F) of the IFFA-TWA collective bargaining agreement then in effect, furloughees remained on the seniority list and retained a right to recall for a period of three years only. (J.A. 34). A subsequent collective bargaining agreement signed in 1983 expanded that time period to five years, but even that did not help most of the incumbents furloughed in 1979. IFFA believes that the actual number of furloughees who were never recalled is 159.[16]

[15] Indeed, in early 1983, Plaintiffs asked the District Court to order TWA to reemploy Plaintiffs immediately, despite the fact that TWA had no vacancies. The District Court agreed, but the Seventh Circuit reversed. *ALSSA v. Trans World Airlines, Inc.*, 713 F.2d 319 (7th Cir. 1983). Accordingly, since TWA had no vacancies for four years (1979-83), the litigation over the settlement in no way delayed Plaintiffs' reemployment.

[16] Plaintiffs also asked the court to rewrite the Settlement Agreement and grant to them seniority for the period of time between the date of the Settlement Agreement and the date on which Plaintiffs were reemployed. Both the District Court and the Court of Appeals rejected this request. *Freedman v. ALSSA*, 730 F.2d 509 (7th Cir.), *cert. denied*, 469 U.S. 899 (1984).

F. The Attorney's Fees Issues

As promised, Plaintiffs' counsel sought an award of fees in excess of $1,250,000 from the $3,000,000 settlement fund. The District Court approved this fee request, which totalled nearly $1,400,000, in June of 1982. (Pet. App. 43a, 44a).[17] Of this amount, $1,250,000 went to counsel for Subclass B (who prior to June of 1979 had served as counsel for the class) based on hourly rates of up to $160 per hour *with a multiplier of two.*[18]

In 1982 Plaintiffs also sought fees from IFFA and from TWA. The District Court did not rule on these motions until 1986. (Pet. App. 24a). Judge Roszkowski found that TWA was not liable for fees under the plain language of the Settlement Agreement. (Pet. App. 29a-32a). The court also specifically noted that the Plaintiffs must have anticipated litigation over the Settlement Agreement, and surely knew that IFFA would object to certain provisions in the Settlement Agreement. (Pet. App. 31a).

IFFA was not as fortunate as TWA. Fees were assessed against IFFA because, in the District Court's view, "a prevailing plaintiff is awarded fees almost automatically". (Pet. App. 32a). IFFA's arguments that it should be judged by a different standard because IFFA was not a "violator of federal law", as stressed in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412

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[17] Thus, the average Subclass B member, who had waited 13-18 years to return to her job, received approximately $2,000 in backpay ($1,500,000 from the settlement fund less $625,000 in attorney's fees is $875,000, which divided by 400 class members equals $2,188).

[18] In this regard, counsel was obviously lucky that the District Court did not at that time have the benefit of this Court's subsequent opinions in *Pennsylvania v. Delaware Valley Citizens Council*, 478 U.S. 546 (1986) and *Pennsylvania v. Delaware Valley Citizens Council*, 483 U.S. 711, 107 S.Ct. 3078 (1987), which cast serious doubt that the use of that multiplier was appropriate.

(1978), were given short shrift. The award of fees against IFFA totalled $180,915.84. (Pet. App. 5a).[19]

A divided Panel of the Seventh Circuit affirmed in May of 1988. (Pet. App. 1a).[20] The panel majority voiced its explicit disagreement with the decision in *Reeves v. Harrell*, 791 F.2d 1481 (11th Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987), which held that parties who intervened in civil rights cases claiming that the settlement or remedy imposed violated their rights should be treated as "functional plaintiffs", and liable for an award of attorney's fees only if their claims were found to be frivolous. 791 F.2d at 1484; Pet. App. 10a. The panel majority rejected this standard, stating:

> [W]ere we to adopt the "functional plaintiff" approach articulated in *Reeves* and advocated by IFFA, we might very well encourage intervenors, and ultimately defendants, in Title VII lawsuits to manufacture constitutionally-derived or statutorily-based defenses in an attempt to cloak themselves in the protective guise of functional plaintiffs, in effect rendering them immune from statutory fee liability except where their defenses are held to be completely without merit. (Pet. App. 13a).

The court also rejected IFFA's claim that the result below created an intolerable tension with its duty of fair representation to its members by declaring that IFFA was "in no way compelled to intervene". (Pet. App. 16a).

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[19] The original award against IFFA was some $48,000 higher, based on hourly rates of up to $160 per hour with a multiplier of two. However, IFFA filed a motion pursuant to Rule 59 of the Federal Rules of Civil Procedure to delete the use of the multiplier in light of this Court's decision in *Pennsylvania v. Delaware Valley Citizens Council*, 478 U.S. 546 (1986). The District Court agreed to reduce the award, but still applied a multiplier of 1.44 in order to account for "delay". (Pet. App. 38a).

[20] Plaintiffs did not choose to appeal the District Court's denial of their request for an award of fees against TWA.

The dissent accepted the *Reeves* "functional plaintiff" standard and found the majority's result inconsistent with the principles articulated in *Christiansburg Garment.* The dissent also noted that IFFA was very much an innocent third party caught in the cross-fire, and had, after all, done only what everyone, including the Seventh Circuit, expected:

> In the settlement negotiations between plaintiffs and TWA, neither side had a strong interest in protecting the jobs of TWA's incumbent employees. Plaintiffs obviously had a strong interest in regaining their old jobs. TWA's primary interest was in settling the lawsuit. TWA was going to have a full complement of flight attendants whether they came from the plaintiffs' or incumbent employees' ranks. While the IFFA may not have had a legal obligation to intervene, it certainly would have been unusual for the IFFA to simply ignore a settlement that substantially altered its contract with TWA and the job security of its members. In fact, this circuit dismissed the incumbent employees' predecessor union as the plaintiffs' class representative specifically because the union's interest in representing the collective bargaining rights of the incumbent employees conflicted with its position as class representative. See *Air Line Stewards and Stewardesses Ass'n, Local 550 v. American Airlines, Inc.*, 490 F.2d 636, 639-42 (7th Cir. 1973). The fact that the IFFA did what its members elected it to do and this circuit expected it to do, that is, represent the interests of incumbent employees, is not something that should subject it to Title VII attorneys' fees. (Pet. App. 20a).

The dissent also noted the chilling effect of the decision below:

> Rather than encouraging persons to act as "private attorneys general," the majority's construction of § 706(k) will have quite the opposite effect. Title VII lawsuits often affect many employees other than the named plaintiffs. The settlement of a Title VII suit or the granting of remedies by a court may leave some employees in a less desirable employment position or out of a job altogether. Many of these affected employees will have substantial claims that the settlement or remedies violate their own rights under a collective bargaining agreement, Title VII, or even the Constitution. The just resolution of these cases requires the full participation of everyone involved. Mechanically assessing attorneys' fees against intervening employees who did not violate anybody's rights and who are not fortunate enough to posture themselves as "plaintiffs," will ensure that in many cases only two sides will be heard in a multisided dispute. (Pet. App. 21a).

SUMMARY OF ARGUMENT

1. Prevailing plaintiffs in Title VII cases are ordinarily entitled to an award of fees absent special circumstances because (1) a private plaintiff is the chosen instrument of Congress and there is a need to encourage plaintiffs of limited means to bring suit; and (2) when a district court awards fees to a prevailing plaintiff it is awarding them against a violator of federal law. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). Both factors are "wholly absent" here, since Plaintiffs' counsel had already received well over One Million Dollars in fees from the settlement fund provided by Defendant TWA, and since IFFA did not violate the law but only intervened upon learning of the settlement which would override its contract and abridge the rights of its members. The policy considerations which justify allowing successful plaintiffs to recover their attorney's fees simply do not apply against a party who has not violated the law. Innocent third parties whose rights are altered by a settlement agreement to which they did not agree should not be subjected to an "almost automatic" award of attorney's fees under the same standard applied to defendants found guilty of illegal discrimination.

2. Moreover, the legislative history of the Civil Rights Attorneys' Fees Awards Act of 1976, which enacted 42 U.S.C. § 1988, indicates Congress understood that civil rights cases can involve more than a typical plaintiff and typical defendant, and that the procedural posture of the case should not be determinative. Accordingly, the court should look beyond the litigation labels the parties bear and analyze who the parties are in connection with the overall purpose of the statute.

3. The Defendant TWA should pay any attorney's fees to which Plaintiffs are entitled. Here there is a strong argument that TWA has already done so. Since Plaintiffs and TWA structured a settlement which they knew was certain to provoke litigation over the retroactive seniority issue, either TWA should pay for Plaintiffs' attorney's fees for the litigation on the settlement issues, or Plaintiffs should absorb those fees themselves since they have waived further fees against TWA. A sharp line is to be drawn between a wrongdoer defendant and innocent third parties who must nonetheless participate in the remedial phases of the litigation in order that the Plaintiffs may be afforded full relief. Although such third parties can be subjected to "minor" and "ancillary" court orders, they cannot be treated in the same fashion as defendants found to have violated the law.

4. The result below creates an impermissible chilling effect upon the rights of innocent third parties adversely affected by the remedies imposed in civil rights actions. If allowed to stand, many innocent and adversely affected incumbent employees will necessarily decide that they simply cannot afford to voice their rights. The law would not be well served by such a result, since it is incumbent upon the court to consider all the competing interests at stake. Labor unions in particular are placed in a nearly impossible quandry since under decisions of this Court they are virtually required to participate in Title VII remedial proceedings.

5. This dilemma facing unions is further compounded by the unions' duty of fair representation to their members. That duty encompasses an obligation to attempt to enforce rights guaranteed under a collective bargaining agreement, which is exactly what IFFA was attempting to do in this case. Moreover, IFFA was the only party that could have attempted to enforce such rights on behalf of its members. The result below unfairly forces unions to choose between participating in remedial proceedings and risking an almost automatic award of attorney's fees if they should not succeed, or declining to participate in those proceedings and facing a possible suit for breach of the duty of fair representation.

ARGUMENT

I. Preliminary Statement

While the procedural history of this litigation is quite complex, the issue to be decided by this Court is relatively simple and straightforward. Pursuant to criteria articulated by decisions of this Court, in civil rights cases attorney's fees are ordinarily to be assessed in favor of successful plaintiffs and against the adjudged wrongdoer defendant absent special circumstances. That is the standard under which the District Court assessed fees against IFFA, which was not a defendant, which had not violated the law, and which intervened only upon learning of a settlement which would override its contract, thereby endangering the job security of its members. If innocent third parties are to be judged by any different standard than that used to assess fees against losing defendants—which seems a necessity since the fact that fees are being awarded against a "violator of federal law" is a central tenet of the reasoning justifying ordinarily awarding fees in favor of successful plaintiffs—then the judgment below must be reversed. In any event, the circumstances here are so exceptional and so "special", that the award of fees against IFFA cannot be permitted to stand.

II. Innocent Third Parties Should Not Be Judged By The Standard Used To Assess Fees Against Defendants Who Have Violated Federal Law

A. *The Policy Considerations Underlying An Award Of Fees Against Wrongdoer Defendants Are Wholly Absent When Innocent Employees (Or Their Unions) Intervene To Protect Their Rights*

Under the "American rule" prevailing litigants in federal court are ordinarily not entitled to recover their attorney's fees from their opponents in the absence of specific statutory authorization. *Alyeska Pipeline Service Company v. The Wilderness Society*, 421 U.S. 240 (1975). The federal civil rights statutes, however, contain fee-shifting provisions authorizing an award of attorney's fees in favor of a "prevailing party".[21] Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), the provision at issue here, states:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for the costs the same as a private person.

The statute itself, obviously, makes no distinction among parties, be they plaintiffs, defendants or intervenors. However, in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), a case involving the fee-shifting provision in Section 204(b) of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b), the Court in a short *Per Curiam* opinion held that successful plaintiffs should

[21] We refer not only to § 706(k) of Title VII, but also to § 204(b) of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b), and 42 U.S.C. § 1988, which are "substantially identical" to § 706(k). *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416 (1978); *Hanrahan v. Hampton*, 446 U.S. 754, 758, n.4 (1980).

"ordinarily recover" an attorney's fee from the unsuccessful defendants "unless special circumstances would render such an award unjust". 390 U.S. at 402. A decade later in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), a Title VII case involving a request for an award of fees by a prevailing defendant, the Court expanded upon and clarified the standards to be utilized. The Court reaffirmed that plaintiffs who prevail against defendants should ordinarily receive an award of fees unless special circumstances exist. *Id.* at 417. On the other hand, defendants who prevail against plaintiffs are to receive an award only upon a finding that the action was "frivolous, unreasonable or without foundation . . . ." *Id.* at 421.

The reasons for ordinarily awarding fees to plaintiffs (who prevail against defendants) are:

> (1) A private plaintiff is the chosen instrument of Congress to vindicate a policy of the highest priority; and
>
> (2) When a district court awards counsel fees to a prevailing plaintiff, it is awarding them *against a violator of federal law.*
>
> (*Id.* at 418).

But these factors, the Court noted, are "wholly absent in the case of a prevailing Title VII defendant". *Id.* Accordingly, prevailing defendants are *not* ordinarily entitled to an award of fees against unsuccessful plaintiffs.

The first listed factor in *Christiansburg*—the chosen instrument of Congress—is based on the need to encourage potential plaintiffs to act as "private attorneys general", and the hope that a fee award to successful plaintiffs will "make it easier for a plaintiff of limited means to bring a meritorious suit." *Id.* at 420, quoting the Remarks of Senator Humphrey, 110 CONG. REC. 12724 (1964). But, as the dissent below noted, this factor "has attenuated, if any, relevance" here. (Pet. App. 21a).

The statute seeks to encourage suits against defendants *who violate federal law. Id.* Moreover, a denial of an award of fees against "functional plaintiffs" would not substantially reduce the incentive for "private attorneys general" to bring civil rights actions, because "such litigants can still expect to recover the substantial portion of their fees from the defendants who actually denied them their (Constitutional) rights, and accordingly the effect on their financial incentive is *marginal at worst*". *Kirkland v. New York State Department of Correctional Services*, 524 F.Supp. 1214, 1219 (S.D.N.Y. 1981). (Emphasis supplied).

Those words were never truer than in this case, where Plaintiffs' counsel was poised to collect more than $1,250,000 (half of which resulted from the use of a "multiplier") if the settlement could only withstand judicial scrutiny. Accordingly, we were left incredulous by the following statement made by the Panel majority below:

> Absent the possibility of recovering their attorneys' fees from IFFA, the prevailing plaintiffs would likely have been hardpressed to come up with sufficient funds to attract counsel willing to defend their settlement before the district court, this court and, finally, the Supreme Court. (Pet. App. 13a, n.10).

Surely the counsel who stood to pocket the $1,250,000 had ample incentive to defend the settlement which would generate that fee.

Turning to the second *Christiansburg* factor, clearly it is "wholly absent". IFFA did not violate the law, but merely attempted to safeguard its contract and represent the interests of innocent incumbent employees affected by the settlement. Indeed, it was IFFA's predecessor which took the steps necessary in order to negotiate the elimination of the discriminatory policy, bring the wrongdoer to justice, and make it possible for Plaintiffs to regain their jobs. Under these circumstances, it seems particularly unjust to treat IFFA in the same fashion as a defendant found to have perpetrated illegal discrimination.

And yet, despite the fact that this basic premise for an "almost automatic" award of fees in favor of Plaintiffs is completely lacking, both courts below simply ignored the fact the fees here were *not* awarded "against a violator of federal law." Both the District Court and Court of Appeals rejected the cases which espoused a "functional plaintiff" doctrine (*i.e.*, innocent third parties who intervene to claim that a settlement or remedy violates *their* rights should be treated as plaintiffs for attorney's fees purposes), but neither court said *why* an essential part of *Christiansburg* could be ignored or *why* fees should "almost automatically" be assessed against an intervenor who had not violated the law. Instead, the Seventh Circuit Panel majority said only that it feared that developing a "functional plaintiff" exception would "encourage intervenors, and ultimately defendants" to "manufacture . . . defenses in an attempt to cloak themselves" with limited immunity for fees. (Pet. App. 13a).[22]

This reasoning is questionable at best. Intervenors do not need to "manufacture" claims, presumably they *have* claims; those claims are what they are intervening to present; and those claims are what might entitle those intervenors to be classified as "functional plaintiffs".[23]

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[22] Presumably, where the court said "defenses", it meant "claims".

[23] Obviously if an intervenor has no claim, and its rights are not being affected by the matters at issue before the court, that intervenor would stand on a very different footing when compared to a party like IFFA who has an actual interest in the litigation. By way of example we point to the county judge in *Haycraft v. Hollenbach*, 606 F.2d 128 (6th Cir. 1979), who was in no way directly implicated in the litigation, but intervened because he wanted to provide his own personal plan for solving the area's school desegregation problems.

Nor can we imagine how the typical Title VII defendant will be able to easily conjure up claims or defenses which will make it appear to be a "functional plaintiff". In any event, such speculative fears do not provide an adequate basis upon which to treat innocent third parties in the same fashion as defendants who have committed illegal acts.

Accordingly, the factors cited in *Christiansburg* have virtually no pertinence here.[24] In contrast, the reasons stated in *Christiansburg* for *not routinely* awarding fees to successful defendants (who prevail against plaintiffs) have an almost uncanny applicability to the facts of this case:

> No matter how honest one's belief that he had been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit. (434 U.S. at 422).

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[24] A third factor, not mentioned in *Christiansburg* but mentioned in *Piggie Park,* also has no relevance here. Under Title II, unlike Title VII, a plaintiff cannot obtain damages but can only obtain injunctive relief; and a plaintiff who obtains an injunction enforcing the civil rights laws does so not just for himself but as a "private attorney general". *Piggie Park,* 390 U.S. at 402. Absent the opportunity for an award of fees, clearly an individual would be hard-pressed to finance a lawsuit in which it was known from the outset that damages could not be collected. *Id.* In this case, however, from the beginning counsel was aiming for an award of backpay to hundreds of individuals, along with the substantial fee that such a result would certainly justify; and, since the union had brought about the end of the discriminatory policy before current counsel entered the case, there was no need to obtain injunctive relief.

Saying that the "course of litigation is rarely predictable" is an understatement in the context of this case. IFFA began by confidently stating black-letter law: a federal district court lacking subject matter jurisdiction over a claim should take no action other than to dismiss that claim. *Mitchell v. Maurer,* 293 U.S. 237 (1934); *City of Kenosha, Wisconsin v. Bruno,* 412 U.S. 507 (1973). It could hardly have been predicted that the District Court would not feel bound by the Seventh Circuit ruling that there was no subject matter jurisdiction (J.A. 30); that the Seventh Circuit would then find (in *ALSSA III*) that the District Court had subject matter jurisdiction for some purposes but not for others; that IFFA would successfully petition for *certiorari* but that the Court would not find it necessary to decide the issue presented (in No. 80-951), because it would instead grant and decide a related petition (No. 78-1545) which the petitioners did not want granted; and that the Seventh Circuit's opinion in *Consolidated,* which formed the basis for IFFA's intervention, would be reversed. Moreover, although IFFA presented facts which "appear(ed) questionable or unfavorable at the outset", i.e. that economic hard times were about to hit TWA which would bring about massive flight attendant furloughs, as it turned out IFFA had an "entirely reasonable ground for bringing" its claims.

Accordingly, IFFA believes that it should be judged as if it were an unsuccessful plaintiff, and assessed fees only upon a finding that its claims were "frivolous, unreasonable or without foundation", a finding which not only has not been made here but obviously cannot possibly be made. After all, IFFA came forward presenting claims, like a plaintiff, and unlike a defendant, IFFA was never accused of illegal acts.

All of which brings us back to the term "functional plaintiff" as coined by the Panel majority below. That phrase apparently sprung from the opinion in *Kirkland,*

524 F.Supp. at 1218. ("[I]ntervenors, in this context are not the actors in the (Constitutional) deprivation . . . they were functionally plaintiffs"). As the District Court correctly noted, at the time the attorney's fees issues were briefed before it in 1982, *Kirkland* was the only case supporting IFFA's position. (Pet. App. 34a). Since that time, however, no less than five Circuits have either explicitly adopted or indicated support for a "functional plaintiff" approach: *Reeves v. Harrell*, 791 F.2d 1481, 1484 (11th Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987) (intervenors who claimed their rights were being violated by a consent decree and who were not responsible for the violations which led to the consent decree are to be characterized as plaintiffs and held liable for attorney's fees only if their claims were frivolous); *Annunziato v. The Gan, Inc.*, 744 F.2d 244 (2nd Cir. 1984) (the policy of awarding fees in order to encourage civil rights plaintiffs to bring actions to vindicate their rights is not applicable to "an innocent third party caught in the cross-fire between plaintiffs and the city" regarding a municipal practice in which the third party had no hand); *Grano v. Barry*, 783 F.2d 1104, 1112 (D.C. Cir. 1986) (a refusal to award fees against intervenors under the "functional plaintiff" theory was within the discretion of the District Court); *Sierra Club v. EPA*, 769 F.2d 796, 810-11 (D.C. Cir. 1985); *National Resource Defense Council, Inc. v. Thomas*, 801 F.2d 457, 467 (D.C. Cir. 1986) (fees will not be awarded against intervenors whose claims were not frivolous and who reasonably attempted to advance the implementation of the Act);[25] *Tunstall v. Office of Judicial Support*, 820

[25] *Sierra Club* involved § 307(f) of the Clean Air Act, 42 U.S.C. § 7607(f), and *Thomas* involved § 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d). While the Panel majority below distinguished Judge Scalia's opinion in *Thomas* on the basis of slightly different statutory phraseology (Pet. App. 8a, n.5), that distinction is quite dubious since this Court has made it clear that § 304(d) of the Clean Air Act (which is substantially identical to the provisions

F.2d 631 (3rd Cir. 1987); and *Richardson v. Alaska Airlines, Inc.*, 750 F.2d 763, 766 (9th Cir. 1984) (the policy considerations which underlie the shifting of attorney's fees do not apply against a party who did not violate the law).[26]

A common thread and central premise run throughout all of these decisions as well as the dissent below: The factors which justify fee-shifting spring from the violation of the law; it is simply not equitable to treat innocent third parties who were never accused of committing a violation in the same fashion as a defendant who broke the law.[27] It was perhaps inevitable that the development of Title VII remedies would injure a great many innocent bystanders, but it is enough that those bystanders are being deprived of legitimate rights and expectations because of a legal wrong committed by someone else. The courts should not compound this injury by routinely requiring the innocent bystanders to pay the attorney's fees of others, absent a showing that the claims brought were frivolous.

B. *Congress Did Not Intend That The Procedural Posture Of The Parties Would Be Determinative*

This Court has aptly described the legislative history of § 706(k) as "sparse" (*Christiansburg*, 434 U.S. at 420), and it is certainly fair to state that there is noth-

at issue in *Thomas* and *Sierra Club*) should be interpreted in the same fashion as § 1988 (which is substantially identical to § 706(k)). *Pennsylvania v. Delaware Valley Citizens Council*, 478 U.S. 546, 559 (1986); *Pennsylvania v. Delaware Valley Citizens Council*, 483 U.S. 711, 107 S.Ct. 3078, 3080, n.1 (1987).

[26] *Richardson* involved 29 U.S.C. § 216(b), which is the applicable attorney's fees provision for the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*

[27] Nor do we believe that IFFA should be penalized because it chose to fight, rather than acquiesce to the deprivation of its rights. As the Second Circuit has said, parties in such a quandry have "no *real* choice". *Annunziato v. The Gan, Inc.*, 744 F.2d 244, 254, n.4 (2nd Cir. 1984) (emphasis in original).

ing in the legislative history of Title VII which indicates that Congress even contemplated how § 706(k) would affect intervenors or other innocent third parties. There is, however, ample evidence in the legislative history that the 1964 Congress was quite concerned about how Title VII would affect the seniority rights of innocent incumbent employees. See the discussion in *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 758-61 (1976); and *Teamsters v. U.S.*, 431 U.S. 324, 350-54 (1977). The result below is clearly inconsistent with that concern.

Moreover, the legislative history of the Civil Rights Attorneys' Fees Awards Act of 1976 (which added a provision virtually identical to § 706(k) to 42 U.S.C. § 1988) seems to suggest that a "functional plaintiff" standard is appropriate.[28] As Senator Tunney, one of the principal proponents of the bill, indicated in submitting the report for the Senate Committee on the Judiciary, Congress was very much aware that the defendant assessed fees would be a "violator of federal law":

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and *if those who violate the Nation's fundamental laws are not to proceed with impunity*, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court. (S. REP. No. 94-1011, 94th Cong., 2d Sess. 2) (Emphasis supplied).[29]

[28] We do not lightly suggest that the 1976 Congress should be able to put words into the mouths of the 1964 Congress. However, it may be appropriate to give some weight to the legislative history of § 1988 in this case given the fact that Congress so clearly indicated that § 1988 was patterned after § 706(k) and also gave explicit approval to the fashion in which the federal courts were developing the interpretation of § 706(k). S. REP. No. 94-1011, 94th Cong., 2d Sess. 2. In addition, as already noted, this Court has said that § 1988 and § 706(k) are to be interpreted in an identical fashion.

But perhaps even more significant is the fact that the 1976 Congress indicated that insofar as attorney's fees are concerned the labels parties bear would not necessarily be determinative:

> In the large majority of cases the party or parties seeking to enforce such rights will be the plaintiffs and/or plaintiff-intervenors. However, in the procedural posture of some cases, the parties seeking to enforce such rights may be the defendants and/or defendant-intervenors. (S. REP. No. 94-1011, 94th Cong., 2d Sess. 4, n.4).[30]

Indeed, logic dictates that in a multi-sided dispute the procedural posture of the parties should *not* be determinative. Instead, the Court should look beyond the litigation labels which are placed upon the parties and analyze *who those parties are* in connection with the overall purpose of the statute. A contrary rule would encourage innocent third parties to "manufacture" ways to make collateral attacks upon the settlement, rather than di-

[29] See also, *Marek v. Chesny*, 473 U.S. 1, 43 (1985) (Brennan, J., dissenting); and 122 CONG. REC. 35117 (1976), where Congressman Drinan, one of the other principal proponents of the legislation, stressed that fees awarded to successful plaintiffs would come "not from the taxpayers, but *from the defendant's money*". (Emphasis supplied).

[30] It can be argued, as Plaintiffs have, that this language refers only to parties asserting *Constitutional* rights (or in the case of § 706(k), Title VII rights). From this language, however, we think it is highly doubtful that Congress intended that parties who intervened only to claim that a settlement was unfairly impinging upon rights guaranteed under the Railway Labor Act should be treated in the same fashion as defendants found guilty of Constitutional or Title VII violations. In any event, in *Zipes I* IFFA was contending, *inter alia*, that settlement deprived it of the benefit of its collective bargaining agreement with TWA in violation of the Fifth Amendment guarantee to Due Process of law, as an examination of those briefs will amply demonstrate.

rectly intervening, in order to "cloak themselves" with the label "plaintiff". Surely the substantive rights of the parties should not turn on so facile a distinction. Surely judicial economy would not be served by having third parties initiate separate lawsuits rather than intervening in the existing suit. The fact is that in relation to the incumbent employees, the class members here were not "plaintiffs". There is no Congressional policy which requires that innocent incumbent employees forced to share the burden of remedying discrimination caused by someone else also be subjected to the further indignity of an "almost automatic" award of attorney's fees merely because they dared to bring the equities of their situation to the attention of the court.

C. *Assessing Fees Against Innocent Incumbent Employees Unfairly Allows Defendants To Shift The Burden Of Litigation Costs Onto Innocent Incumbent Employees Who Are Already Sharing The Burden Of Remedying Discrimination They Did Not Commit*

In any Title VII case where plaintiffs prevail there will always be a wrongdoer defendant who may be assessed fees; it is not necessary to have innocent and adversely affected employees pay plaintiffs' lawyers in order to encourage private attorneys general. Moreover, if the plaintiffs in any case should, because of a weakness in their case, agree to waive or limit the fees they can collect against the accused defendant, that waiver should not fall on the heads of innocent third parties.

It is, after all, the defendant who has brought all of this about. It was the illegal discrimination perpetrated by TWA which set off the chain of events which eventually brought IFFA into this litigation and caused the predicament of the incumbent employees. Particularly in a settlement context such as this, a defendant has great power to wreak havoc with the lives of incumbent em-

ployees.[31] Under such circumstances, logic and equity support a standard under which the defendant would remain liable for any attorney's fees of the plaintiffs which are generated by the claims of innocent third parties; or, in the event that plaintiffs have agreed to an ironclad waiver of any further relief against the defendant, plaintiffs would not be able to recover any fees from third parties whose claims are not frivolous.

Although Title VII plaintiffs begin cloaked in the mantle of public interest, *Hensley v. Eckerhart*, 461 U.S. 424, 443, n.2 (1983) (Brennan, J., dissenting), as Justice Brennan has noted it is possible that thereafter individual and public interests will diverge. *Evans v. Jeff D.*, 475 U.S. 717, 752, n.4 (1986) (Brennan, J., dissenting). At that point, the courts must "interpret the legislation so as not to frustrate Congress' intentions". *Id.* When plaintiffs have settled cheaply with the wrongdoer defendant and are litigating to obtain what is actually the lion's share of their remedy from innocent incumbents, it is highly questionable to what extent plaintiffs still wear the cloak of public interest. Moreover, in *Hensley* the Court held that the extent of a plaintiff's success is a crucial factor in determining the proper amount of the attorney's fees to be awarded. Similarly here, where Plaintiffs settled with TWA for pennies on the dollar, it is appropriate to consider the degree of their success against TWA in determining whether plaintiffs should enjoy a right to an "almost automatic" award of attorney's fees against innocent employees.

In addition, it is clear that in a settlement context it is permissible for plaintiffs to receive less attorney's

[31] Here clearly it was the decision to settle which generated much of the problem. Had there been no settlement, and TWA prevailed, there would have been no litigation over the remedy; if there had been no settlement, and the Plaintiffs had prevailed, obviously the litigation over the remedy would have been much more limited than what actually took place.

fees (or other relief) than they might otherwise be entitled to receive. This Court has upheld a defendant's ability to limit its liability for backpay by offering a plaintiff with a pending claim a position without retroactive competitive seniority in *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982); to limit its liability for attorney's fees by making an offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure in *Marek v. Chesny*, 473 U.S. 1 (1985); and to negotiate a waiver of attorney's fees entirely pursuant to a lump-sum settlement with the plaintiff in *Jeff D.* But the question *here* is whether the defendant can negotiate a settlement agreement waiving fees when *it knows* that the settlement will certainly provoke litigation between the incumbents and the plaintiffs, thereby shifting its responsibility for further fees to the innocent employees.[32] Surely the better rule would be that either the defendant remains responsible for any fees to which the plaintiffs might be entitled as a result of litigation with incumbent employees, or that the waiver of fees against the defendant by the plaintiffs accrues to the benefit of the innocent third parties. Simply put, TWA should pay any fees which Plaintiffs are entitled to recover; and a very strong argument can be made that TWA *has already done so.*

This approach is certainly consistent with other decisions of this Court which indicate that in civil rights cases liability, for fees or otherwise, is tied to the commission of a remediable violation of the law. In *Supreme*

[32] In dissenting from the denial of *certiorari* in *Long v. Bonnes*, 455 U.S. 961 (1982), Justice Rehnquist, with whom Justice O'Connor joined, said that it would disregard a central purpose of § 1988 to award attorney's fees pursuant to a settlement "even if the discernible benefit was conferred gratuitously or was undertaken simply to avoid further litigation expenses". *Id.* at 967. Here, TWA gave the plaintiffs their jobs back with a way to obtain seniority because it would cost TWA nothing, and relieve TWA of further litigation expenses, while shifting the burden of the remedial litigation to IFFA.

Court of Virginia v. Consumers Union, 446 U.S. 719 (1980), despite success on the merits plaintiffs were denied a request for attorney's fees against the Supreme Court of Virginia because the court was immune from damage awards. 446 U.S. at 738-39. ("[T]here is no indication that Congress intended to permit an award of attorney's fees to be premised on acts that themselves would be insulated from even prospective relief"). (*Id.* at 739). In *Kentucky v. Graham*, 473 U.S. 159 (1985), the Court denied a request for attorney's fees against the state even though plaintiffs had successfully sued state officials in their personal capacity. ("Section 1988 simply does not create fee liability where merits liability is non-existent"). (473 U.S. at 168). Finally, in *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375 (1982), the Court held that an employer association which had not participated or acquiesced in discrimination by a union in the operation of an exclusive hiring hall could not be required to share the cost of a remedial program. Justice Rehnquist said:

> We think that the principle enunciated in these cases, transposed to the instant factual situation, offers no support for the imposition of injunctive relief against a party found not to have violated any substantive right of respondents. This is not to say that defendants in the position of petitioners might not, upon an appropriate evidentiary showing, be retained in the lawsuit and even subjected to such minor and ancillary provisions of an injunctive order as the District Court might find necessary to grant complete relief to respondents from the discrimination they suffered at the hands of the Union. See *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 399-400 (1982). But that sort of minor and ancillary relief is not the same, and cannot be the same, as that awarded against a party found to have infringed the statutory rights of persons in the position of respondents.
>
> . . . .

> Absent a supportable finding of liability, we see no basis for requiring the employers or the associations to aid either in paying for the cost of the remedial program as a whole or in establishing and administering the training program. (458 U.S. at 399-400).

The "cost" of the remedial program which the petitioners had been asked to bear was $70,000. See the concurring opinion of Justice O'Connor, 458 U.S. at 404, n.2. Clearly "costs" under § 706(k) can be just as, and often more, significant. Obviously, a sharp line is to be drawn between those who violate the law and those caught in the middle between victim and wrongdoer. Being held liable for attorney's fees under the same standard applied to defendants adjudged to have violated the law is hardly "minor" or "ancillary". Those forced to participate in litigation regarding the proper remedy for discrimination committed by someone else and against someone else should not ordinarily be required to pay anyone else's attorney's fees.

III. The Result Below Creates An Impermissible Chilling Effect Upon The Rights Of Innocent Third Parties Adversely Affected By Remedies Imposed In Civil Rights Actions

It has been said that a major purpose of the civil rights fee-shifting statutes is to encourage the exploration of new and undeveloped areas of civil rights law. *Northcross v. Board of Education*, 611 F.2d 624, 634 (6th Cir. 1979). Certainly those new and undeveloped areas concern not just the rights of plaintiffs but the rights of innocent third parties who may be adversely affected by the remedies imposed in civil rights cases both through settlements and litigated judgments. Indeed, this Court has continually demonstrated a distinct sensitivity to the dilemmas confronting such innocent third parties, and, we think it is fair to say, the Court has encouraged those third parties to bring the equities of their positions to

the courthouse door. To demonstrate this, we need look no further than Justice Powell's concurring opinion in *Zipes I*, where he said:

> [W]hen the victims of discrimination have slept on their rights, it will often be unfair to award them full retroactive seniority at the expense of employees who may have accrued their present seniority in good faith. When timely charges have not been filed, a district court should consider these equities in determining whether to award competitive-status seniority, and the presence of a settlement between the employer and the plaintiffs should not affect the balancing of these equities. Under any other rule, employers will be able to settle Title VII actions, in part, by bargaining away the rights of current employees. (455 U.S. at 401, n.1).

Moreover, just two months after the decision in *Zipes I*, Justice O'Connor said the following in delivering the opinion of the Court in *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982):

> [W]e should be wary of any rule that encourages job offers that compel innocent workers to sacrifice their seniority to a person who has only claimed, but not yet proven, unlawful discrimination. . . .
>
> . . . .
>
> . . . We do not believe that "the large objectives" of Title VII, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (citation omitted), require innocent employees to carry such a heavy burden. (458 U.S. at 240).

We would have preferred to have had both of those statements made as part of a majority opinion in IFFA's favor in *Zipes I*. The issue for today, however, is whether IFFA should be subjected to an "almost automatic" award of attorney's fees because it was not able to achieve that result in what obviously was, and is, a rapidly changing and developing area of the law. We

cannot believe that the "large objectives" of Title VII require the innocent employees to carry *this* burden either.

But to understand the true horns of the dilemma facing unions and innocent incumbent employees in Title VII cases, one must examine the decisions of this Court in *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976), and *Teamsters v. U.S.*, 431 U.S. 324 (1977). In *Franks*, the Court first held that a grant of retroactive competitive seniority was an appropriate remedial measure for Title VII plaintiffs who are proven victims of racial discrimination. The Court went on to note that conflict of interest between plaintiffs and incumbents would *always* be present where important employment benefits were determined on the basis of seniority (424 U.S. at 774); said that a "sharing of the burden of the past discrimination" between incumbents and discriminatees was presumptively necessary (*Id.* at 777); left for another day the issue of whether the defendant employer adjudged guilty of illegal discrimination should be required to pay damages to the innocent and adversely affected incumbents (*Id.* at 777, n.39); and then said that successful Title VII plaintiffs should be granted retroactive competitive seniority absent "unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases". (*Id.* at 779, n.41).

Thus, when IFFA intervened in 1979, *Franks* posed two distinct problems: (1) What *is* unusual adverse impact; and (2) how can it be demonstrated, since any evidence on how a remedy would affect incumbent employees would be necessarily speculative and inconclusive? Indeed, IFFA presented evidence indicating that the settlement might very well cost some incumbents their jobs, which surely is the most adverse impact an affected employee in a Title VII case could feel. Unsurprisingly perhaps, the District Court did not find this speculation

to be persuasive. And while history eventually proved IFFA to be correct, nonetheless IFFA was subjected to an "almost automatic" award of attorney's fees because it could only predict, but not prove, what the future would hold.

In *Teamsters*, the Court reversed a lower court determination that a union and an employer had been guilty of illegal discrimination, finding that the union could not be held liable. Nonetheless, the Court said:

> The union *will properly remain* in this litigation as a defendant *so that full relief may be awarded* the victims of the employer's post-Act discrimination. Fed.Rule Civ.Proc. 19(a). (431 U.S. at 356, n.43). (Emphasis supplied).

The Court went on to outline the difficulties confronting the District Court in determining the proper remedy upon remand:

> [T]he District Court will again be faced with the delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing. (*Id.* at 372).
>
> . . . .
>
> Especially when immediate implementation of an equitable remedy threatens to impinge upon the expectations of innocent parties, the courts must "look to the practical realities and necessities inescapably involved in reconciling competing interests," in order to determine the "special blend of what is necessary, what is fair, and what is workable." (*Id.* at 375).

Finally, the Court said that until evidentiary remedial hearings were held:

> [I]t is not possible to evaluate abstract claims concerning the equitable balance that should be struck between the statutory rights of victims and the con-

tractual rights of non-victim employees. (*Id.* at 376).

Clearly, under *Teamsters*, IFFA's intervention was not only proper, it was perhaps required, and if IFFA had not intervened it should have been joined as a Rule 19 defendant. Just as clearly, a union which participates in such remedial hearings is not there to sit on its hands, but for a specific purpose: to safeguard its contract and represent the interests of the adversely affected innocent incumbents. The inherent unfairness in subjecting a union engaged on such a mission to an "almost automatic" award of attorney's fees if it does not prevail is readily apparent. When the District Court is engaged in such ethereal tasks as "reconciling competing interests" and evaluating "abstract claims concerning the equitable balance that should be struck", there is no justice in assessing attorney's fees against litigants who did not violate the law but are nonetheless required to participate.

In numerous other cases the Court has expressed its concern for the plight of innocent third parties affected by civil rights remedies. For example, see *Florida v. Long*, 487 U.S. ——, ——, 108 S.Ct. 2354, 2359 (1988) (one of the criteria for determining whether retroactive awards are appropriate in Title VII pension cases is whether such liability "will produce inequitable results for the States, employers, retirees and pension funds affected"); *U.S. v. Paradise*, 480 U.S. 149, 182-86 (1987); *Local 28 of the Sheet Metal Workers International Association v. Equal Employment Opportunity Commission*, 478 U.S. 421, 479 (1986); *Local Number 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501, 512 (1986) ("the consent decree was fair and reasonable to non-minority firefighters"); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 282-84 (1986) ("layoffs impose the entire burden of achieving racial equality on particular individuals,

often resulting in serious disruption of their lives. That burden is too intrusive"); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 575 (1984) ("Title VII protects bona fide seniority systems, and it is inappropriate to deny an innocent employee the benefits of his seniority in order to provide a remedy in a pattern-or-practice suit"); *Fullilove v. Klutznick*, 448 U.S. 448, 514 (1980) ("A race-conscious remedy should not be approved without consideration of an additional crucial factor—the effect of the set-aside upon innocent third parties"); *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979) ("the plan does not unnecessarily trammel the interests of the white employees"); *Regents of University of California v. Bakke*, 438 U.S. 265, 307 (1978) ("We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative or administrative findings of constitutional or statutory violations"); *City of Los Angeles, Department of Water & Power v. Manhart*, 435 U.S. 702, 722-23 (1978) ("Retroactive liability could be devastating for a pension fund. The harm would fall in large part on innocent third parties").

Indeed, the sheer number of such cases alone (all decided by the Court in the last 13 years) demonstrates how important this area of the law is and how quickly it is changing. Unquestionably it is important that the claims of innocent third parties be heard, and it seems that this Court wants them to be heard.[33] Just as clearly,

[33] Indeed, Justice Rehnquist has said the following in a dissent (joined by Chief Justice Burger and Justice White) from the denial of *certiorari* in *Bushey v. New York State Civil Service Commission*, 469 U.S. 1117 (1985):

> Members of this Court have recognized on other occasions that "affirmative action" plans must be policed to prevent the practice of discrimination for discrimination's sake . . . and to protect the interest of innocent third parties. . . . These interests will not be sufficiently protected if agencies charged

forcing those third parties to risk an "almost automatic" award of attorney's fees against them if they do not prevail will have a severe chilling effect upon their claims; many will necessarily decide that they will not be able to afford to voice their rights. The law would not be well served by such a result, for, particularly in this sensitive area, it is incumbent on the court to consider all the competing interests at stake. *Kirkland*, 524 F.Supp. at 1219. These third parties are in a predicament not of their making; and when a district court attempts to fulfill the difficult, imprecise and nebulous tasks ascribed to it in *Franks* and *Teamsters* it necessarily will be making choices between two groups, both of which have wholly legitimate expectations. If the innocent third parties are to come forward and aid the court in making these choices, for attorney's fees purposes at least, those third parties should be on a level playing field with those with whom they are forced to compete.

IV. Imposing An "Almost Automatic" Award Of Attorney's Fees Against Labor Unions In Circumstances Such As This Creates An Intolerable Conflict With The Union's Duty Of Fair Representation

The duty of fair representation was *judicially implied* by this Court from the Railway Labor Act, and later from the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, the statutes which allow unions to become exclusive agents for all employees and their bargaining unit for purposes of establishing conditions of employment. *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 1982

with discrimination may simply cave in to the allegations without even considering justifications for, or attempting to justify, their original employment decisions . . . . (469 U.S. at 1120-21, citations omitted).

Clearly the best way to protect the interest of third parties is to have them intervene and be heard. The result below, however, erects a significant and undesirable barrier discouraging such participation.

(1944); *Vaca v. Sipes*, 386 U.S. 171 (1967). This duty can be breached if a union's actions are hostile or discriminatory, or if the union arbitrarily ignores a meritorious claim by one of its members. See generally, *IBEW v. Foust*, 442 U.S. 42 (1979); *Humphrey v. Moore*, 375 U.S. 335 (1964). The duty of fair representation requires the union to "represent fairly the interests of all bargaining-unit members during the negotiation, administration *and enforcement* of collective bargaining agreements". *Foust*, 442 U.S. at 46 (emphasis supplied); *Humphrey*, 375 U.S. at 342.

In this litigation, IFFA tried to enforce its collective bargaining agreement. Although it failed, it is now clear that the stakes were not exaggerated; the settlement effectively cost 159 flight attendants their jobs. Nonetheless, IFFA has been subjected to an enormous award of attorney's fees merely because it attempted to preserve its members' contractual rights. An award of fees under these circumstances creates an intolerable tension with the union's duty of fair representation to its members, and for that reason the award must be reversed.

This analysis starts with *ALSSA II*, where the union was removed as class representative for the Plaintiffs because it had "obligations to groups which had conflicting interest". 490 F.2d at 640. There is no doubt that the "obligations" to which the Seventh Circuit referred consist of the union's duty of fair representation to its members, particularly the more junior incumbents. Next, one must look to the Settlement Agreement itself, where Plaintiffs and TWA took pains to make certain that the settlement would supersede and override IFFA's collective bargaining agreement with TWA. (J.A. 20).[34] More-

[34] Article 10(F) of the IFFA-TWA collective bargaining agreement then provided:

> Any employee who resigns or who is dismissed from the service of the Company shall thereupon forfeit all previously accrued seniority, and the employee's name will be removed from the seniority list(s). (J.A. 33).

over, Plaintiffs and TWA gave notice to IFFA of the settlement proceedings and virtually invited the union to intervene. Clearly the Plaintiffs and TWA believed it was necessary to override the collective bargaining agreement in order to obtain the relief contemplated by the settlement.[35] In addition, as both the District Court and Seventh Circuit subsequently noted, Plaintiffs knew that the form of the settlement would force IFFA to litigate. (Pet. App. 31a; *Freedman*, 730 F.2d at 514).[36]

The Ninth Circuit faced a similar situation in *Richardson v. Alaska Airlines, Inc.*, 750 F.2d 763 (9th Cir. 1984), a case involving the Age Discrimination In Employment Act, 29 U.S.C. § 621, *et seq.* There the union intervened to object to a consent decree that "appeared unfairly to affect seniority and other rights protected by its collective bargaining agreement . . . ." 750 F.2d at 766. When attorney's fees were sought against the union, the Ninth Circuit indicated that such an award would unfairly conflict with the union's duty of fair representation, stating simply that "Imposing a fee award would only punish (the union) for performing an act it was under a duty to do." *Id.*[37]

[35] Therein lies the reason for the litigation involving the court's jurisdiction. Plaintiffs and TWA never needed the court to settle; they needed the court in order to override the collective bargaining agreement and grant Plaintiffs' seniority.

[36] The Seventh Circuit said:

> That IFFA might object would have been predictable both because the agreement was patently adverse to the interests of current employees represented by IFFA and because this circuit's prior decision that incumbent and former employees should be separately represented clearly indicated the inimical interests of the two groups. (730 F.2d at 514).

[37] As the Panel majority below noted this language is arguably dicta due to the fact that the statute involved in *Richardson* provides an alternative basis for the result there. (Pet. App. 8a, n.5). Dicta or not, the Ninth Circuit is correct.

The Panel majority below seemed unconcerned with IFFA's duty of fair representation, saying only that IFFA was "in no way compelled to intervene in this lawsuit" and thus holding that IFFA's duty of fair representation did not constitute a special circumstance which would exempt IFFA from fee liability. (Pet. App. 16a). This seems to miss much of the point. Since IFFA *did* intervene, we will never know whether IFFA would have been sued by its members had it not intervened; nor do we know if that suit would have been successful, since the parameters of the duty of fair representation are somewhat unclear.[38] What we do know is that the duty of fair representation encompasses an obligation to enforce rights guaranteed under a collective bargaining agreement, that Plaintiffs could only gain the seniority they sought by seeking to nullify rights under the collective bargaining agreement, and that *IFFA was the only party which could attempt to enforce the rights of the incumbents under the collective bargaining agreement.* Moreover, given (1) the Seventh Circuit holding that the claims of 92% of the Plaintiffs were untimely and also lacking in subject matter jurisdiction; (2) that the grant of seniority would have impact throughout the bargaining unit and actually endanger the jobs of junior incumbents; and (3) that there were no conflicting groups within the bargaining unit that would be adversely affected if IFFA had been successful, it would not

[38] As the Fourth Circuit has said:

> "[D]uty of fair representation" is a legal term of art, incapable of precise definition. There is no code that explicitly prescribes the standards that govern unions in representing their members in processing grievances. Whether a union breached its duty of fair representation depends on the facts of each case. But pronouncements made from time to time by the Supreme Court, articulating the somewhat hazy contours of the union's obligations, do furnish a measure of guidance. *Griffin v. UAW*, 469 F.2d 181, 182 (4th Cir. 1972). (Citations omitted).

only have been unusual, as the dissent noted (Pet. App. 20a), but also unthinkable for IFFA to have made no effort to serve its members.

Beyond this, we must note that it seems quite hypocritical for the Seventh Circuit on one hand to lecture the union about its obligation to the incumbents and then on the other to uphold an enormous award of attorney's fees against the union merely because the union fulfilled that obligation. When this factor is coupled with the clear requirement from this Court's decision in *Teamsters* that a union participate in Title VII remedial proceedings, treating a union like a guilty defendant for attorney's fees purposes places more weight upon the union's duty of fair representation than the union can fairly be asked to bear. Given the relevant judicial pronouncements IFFA had no real choice but to intervene; it should not be treated like an adjudged wrongdoer merely because it did not succeed.

In his concurring opinion in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), Justice Blackmun noted that an employer may sometimes "be thrust onto the horns of a dilemma", requiring it to either violate Title VII or a presumptively valid state law, and said that the presence of such a dilemma was surely relevant for purposes of determining whether or not the employer was to be held liable for backpay. 422 U.S. at 448. IFFA was in a similar predicament here: it could attempt to fulfill its legal obligation to the incumbents and risk an "almost automatic" award of attorney's fees if it did not prevail; or it could ignore the rights of the incumbents and risk a suit for the breach of the duty of fair representation. Surely, the Union's attempt to serve the interests of its constituency is a "relevant consideration in considering whether to award" attorney's fees against IFFA in the same fashion as if it were a defendant who had violated federal law. *Id.*

V. The Award Of Fees To Plaintiffs Cannot Stand Due To The "Special Circumstances" Of This Case

Finally, there is a relatively easy basis upon which this case can be decided. This Court has said that prevailing plaintiffs are "ordinarily" entitled to an award of fees "unless special circumstances would render such an award unjust". *Piggie Park*, 390 U.S. at 402; *Christiansburg*, 434 U.S. at 417. Since those decisions there has been precious little expansion as to what constitutes "special circumstances". The circumstances of this case are so extreme however, that the Court need only say that because of those exceptional circumstances the award of fees here must be reversed. Those special circumstances include the following:

1. It was the (predecessor) union which filed the charge with the EEOC challenging TWA's discriminatory policy, filed this lawsuit, and negotiated the termination of the "no-motherhood policy". This made it possible for Plaintiffs to eventually regain their jobs, and for Plaintiffs' current counsel to earn their million-dollar-plus fees.

2. The Seventh Circuit indicated to the union in *ALSSA II* that it could not proceed as class representative for the Plaintiffs because of obligations it owed to incumbent flight attendants who had diverse interests from that of the Plaintiff class. Years later, IFFA was slapped with an award of attorney's fees merely for fulfilling that obligation.

3. IFFA had an actual interest in the litigation, and ultimately was deprived of the benefit of its contract, though IFFA had done no wrong. And while the courts believed that IFFA's claims regarding the impact the settlement would have on its membership were overstated, time proved otherwise.

4. The result below creates an unbearable strain on a union's duty of fair representation. Unions have a duty to attempt to enforce the contractual rights of their members under the collective bargaining agreement, and such claims should be brought to the attention of the district court in Title VII remedial proceedings. But if the result below is allowed to stand, unions will be forced to make the very unpleasant choice of either intervening and facing an award of attorney's fees if they should not succeed, or not intervening and facing a possible suit for breach of the duty of fair representation.

5. The law changed dramatically in the midst of litigation. Not only did the law change, but it changed *in this case.* The appellate opinion on which the settlement was structured and IFFA's intervention was based was reversed.

6. Plaintiffs' counsel has already received an enormous fee for this case, of which approximately $625,000 was from the use of a "multiplier". The fee-shifting statutes were designed to insure that Plaintiffs could attract competent counsel, not to improve the financial lot of attorneys. *Pennsylvania v. Delaware Valley Citizens Council,* 478 U.S. at 565. Under the circumstances, counsel have already been more than adequately compensated, and no further award of fees is necessary in order to fulfill the purposes of § 706 (k).

CONCLUSION

The judgment below should be reversed and remanded with instructions to dismiss the claim for attorney's fees against IFFA.

Respectfully submitted,

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March 3, 1989

RESPONDENT'S

BRIEF

(8)

No. 88-608

In The
Supreme Court of the United States
October Term, 1988

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Petitioner,

v.

ANNE B. ZIPES, et al.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

The question presented is fairly stated by *Amicus* United States and the Equal Employment Opportunity Commission ("amicus E.E.O.C." herein).

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STATEMENT OF FACTS

Before 1970, Trans World Airlines fired stewardesses who became pregnant or adopted children, but not male employees who became parents. On August 8, 1970, the union[1] filed the complaint, alleging discrimination in violation of Title VII. *Air Line Stewards And Stewardesses Ass'n, Local 550 v. Trans World Airlines, Inc.*, 713 F.2d 319, 320 (7th Cir. 1983).

The union members were incumbent stewardesses as to whom only prospective relief was warranted. In the lawsuit, the union also purported to represent the previous, illegally fired, stewardesses who were no longer union members. In July 1971, the union entered into a settlement agreement with TWA that obtained the prospective relief desired by the incumbents but provided the former stewardesses with no back pay, retroactive

[1] The union was then the predecessor to Petitioner IFFA. These successive representatives of incumbent stewardesses are referred to herein as "the union".

seniority (either company seniority or competitive seniority), or even the right to return to work except as openings might occur. *Air Line Stewards And Stewardesses Ass'n, Local 550 v. American Airlines And Trans World Airlines,* 490 F.2d 636, 638 (7th Cir. 1973), *cert. denied,* 416 U.S. 993 (1974). Because of the union's conflict of interest and its refusal to give opt-out notices to the former stewardesses, the Seventh Circuit vacated the District Court's approval of the settlement, ejected the union as the class representative, and remanded for resolution of the merits. *Id.* at 640, 643.

After remand, plaintiffs obtained summary judgment. On appeal, the Seventh Circuit affirmed on the merits but reversed as to those class members who did not file timely EEOC charges. *In re Consolidated Pretrial Proceedings in the Airline Cases,* 582 F.2d 1142 (7th Cir. 1978), *rev'd, sub nom. Zipes v. TWA,* 455 U.S. 385 (1982). The mandate was stayed and both sides filed petitions for *certiorari.* This Court granted a motion to defer consideration of the *certiorari* petitions, pending effectuation of a settlement which was then being negotiated.

A settlement was approved by the District Court which provided for $3,000,000 in back pay, reinstatement, retroactive company seniority and (as amended, J.A. 27)[2] such retroactive competitive seniority as the District Court might order after a hearing in which the union participated. *ALSSA v. TWA,* 630 F.2d 1164, 1166 (7th Cir. 1980). The class was divided into Sub-Class A (those who had filed timely charges) and Sub-Class B (those who did not). *Id.* at 1166.

At the suggestion of plaintiffs, the union was invited to take part in a hearing on the question of competitive seniority. Instead, the union filed a full-blown petition to intervene, claiming that the court lacked jurisdiction over the claims of Sub-Class B, that the settlement could not be approved without the union's consent, and that any grant of retroactive seniority would impermissibly infringe upon the contract rights of the incumbents. (J.A. 23 ¶¶ 11, 16, 18) If the union had its way, the settlement would have been held for naught, and the plaintiffs and TWA would have been forced to continue litigating the claims on the merits (and the question of jurisdiction) to the bitter end, in a winner-take-all contest. (J.A. 32)

[2] Citations to the Joint Appendix are "(J.A. ___)", and to the Appendix to Petitioner's Certiorari Petition as "(P.A. ___)".

The District Court rejected the union's jurisdiction objection (J.A. 30) and, after three days of evidentiary hearings (P.A. 4a), entered two orders. In one, the settlement was approved under Rule 23(e), Fed.R.Civ.P. (J.A. 35-36) In the other order, the District Court concluded that granting retroactive competitive seniority would not have an unusual adverse impact on the incumbents in an untypical way, and accordingly ordered that all re-employed class members be credited with full competitive seniority retroactive to the dates when they would have returned to work (upon completion of pregnancy leaves) in the absence of TWA's no-mothers policy. (J.A. 37-38)

The union appealed not only from the seniority order, but also from the orders which approved the settlement and rejected the union's jurisdictional challenge. The Seventh Circuit affirmed, *ALSSA v. TWA,* 630 F.2d 1164 (7th Cir. 1980), and the union obtained *certiorari.* This Court affirmed those orders, and reversed the earlier Seventh Circuit holding regarding subject matter jurisdiction. *Zipes v. Trans World Airlines,* 455 U.S. 385 (1982).

Because of the union's intervention and appeals, the plaintiff class' ultimate enjoyment of the settlement's benefits was delayed and came at a greatly increased cost. (P.A. 35a) On July 16, 1986, the District Court's amended order required the union to pay a total of $180,915.84 for plaintiffs' attorneys' fees and $5,978 for expenses. (P.A. 37a, 40a)[3]

SUMMARY OF ARGUMENT

1. The Congressional purpose underlying § 706(k), 42 U.S.C. § 2000e-5(k), is to enable Title VII victims to obtain lawyers,

[3] $57,258 thereof is for the work of counsel for Sub-Class A, who have already been paid from the $3,000,000 settlement fund for their work in fighting with the union. If plaintiffs prevail here, this amount will be refunded to the members of Sub-Class A. (P.A. 37a)

thereby facilitating private enforcement of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. Since rightful place seniority is a vital part of the relief available under Title VII, Congress' intention to ensure the payment of a plaintiff's legal fees must be applied to the relief stage as well as to the liability phase of the case.

2. The fee-shifting provision is neither punitive nor limited to wrongdoing defendants. It is to encourage plaintiffs to vindicate a national policy of the highest priority. While *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412 (1978), observed that fee awards are ordinarily imposed on violators of the law, this Court did not hold that wrongdoing is a precondition for fee awards to plaintiffs.

3. Congress intended that plaintiffs pay defendants' attorneys' fees only in groundless suits, in order not to discourage potential plaintiffs. That being the underlying purpose of a plaintiff's semi-immunity for a defendant's fees, it is applicable only when he is genuinely a plaintiff — that is, when he seeks redress for a violation of either Title VII or some other federal statute which carries a similar fee-shifting provision. The union was not a "functional plaintiff" because it neither asserted a violation of, nor a right to relief under, Title VII or any other fee-shifting statute. Moreover, the history of this case, including the union's litigation posture at the relief stage, demonstrates that the union was a functional *defendant*. The union's interests were diametrically opposed to the plaintiffs; the union presented the only opposition to plaintiffs' obtaining complete relief; and the union's efforts were aimed at destroying plaintiffs' entire case.

4. The rare case in which the opposing parties are both seeking redress from each other for violations of Title VII (or some other statute with a fee-shifting provision) would not be resolvable by the scriptures of *Christiansburg*. In such a case, the policy considerations underlying § 706(k) require that attorneys' fees for work made necessary by an intervenor should be borne by the intervenor rather than the winning plaintiff. Reasons of policy also militate against imposing plaintiffs' attorneys' fees on the defendant for work made necessary by an intervenor.

I

THE CONGRESSIONAL PURPOSE OF ENCOURAGING PRIVATE PLAINTIFFS WOULD BE FRUSTRATED IF ATTORNEYS' FEES WERE NOT FORTHCOMING AT THE VITAL STAGE OF FASHIONING RELIEF

The two central goals of the Civil Rights Act of 1964 were to eradicate discriminatory practices and make persons whole for injuries suffered by reason of unlawful employment practices. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). Recognizing that enforcement of the Act would be largely dependent upon private plaintiffs, who typically lack the means to attract competent lawyers, Congress intended § 706(k)[4] to encourage the bringing of private actions in order to facilitate enforcement of Title VII. *See Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 420 (1978) (citing 110 Cong. Rec. 12724 (1964) (remarks of Sen. Humphrey)); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-402 (1968).

The legal services performed at the relief stage comprise an important aspect of Title VII enforcement. In particular, seniority is a vital part of the make-whole remedy of Title VII. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 774 (1976). Lawyers will not be attracted as easily if they cannot expect payment for the work at the relief stage. Thus, ensuring the payment of plaintiffs' attorneys' fees for the work involved in a seniority dispute is critical. Since the fee-shifting scheme was designed to encourage a plaintiff's obtaining benefits to the public, requiring victorious plaintiffs to bear the costs of that significant a part of the proceeding could not be squared with Congress' purpose.

Every Title VII plaintiff (and his lawyer) should anticipate the performance of substantial legal services even after the defendant's violation is proved. At the stage when relief must be fashioned, the plaintiff will frequently encounter opposition

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[4] 42 U.S.C. § 2000e-5(k).

from non-defendant parties. This case serves as an instructive example. After the settlement with TWA in 1979, four years elapsed before the plaintiffs enjoyed the first benefit of that settlement.[5] And from that time until the plaintiffs' lawyers obtained a fee award against the union in 1986 for those 4 years of work, another 2 years elapsed.

To the extent this case is any guide, if attorneys' fees were not recoverable for post-settlement work, it would serve as a serious disincentive, which cannot be reconciled with either the language or purpose of § 706(k).

II

LIABILITY FOR FEES IS NOT RESTRICTED TO DEFENDANT-WRONGDOERS

Introduction

Someone will inevitably bear the costs of necessary legal services. Inasmuch as the performance of legal representation in itself incurs a cost, the question is not *whether* that cost must be borne, but *upon whom* the burden should fall.

A. The Statute Makes No Connection Between Wrongdoing And Liability For Fees

As this Court held in *Alyeska Pipeline Service Co. v. Wilderness Society,* "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." 421 U.S. 240, 262 (1975). The interpretation of the statute begins, as it must, with the language of the statute. *United States v. Turkette,* 452 U.S. 576, 580 (1981). Section 706(k) provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee." In the absence of wording to the contrary, the natural and logical meaning of those words is that

[5] As shown *post* (at 13-14), it was not merely a matter of waiting those 4 years. Plaintiffs were required to fend off the union in order to succeed at all.

the party who must pay a winning plaintiff's attorneys' fees is the party against whom the plaintiff prevailed.[6] Plaintiffs here are indisputably the "prevailing party".

The argument of the union and *amicus* E.E.O.C. that "innocent" intervenors are not liable for attorneys' fees is premised on the notion that Congress designed § 706(k) to punish violators of Title VII. That reading of § 706(k) is not warranted because this section was intended to facilitate private enforcement, not to punish violators.[7] To interpret it as the union and *amicus* E.E.O.C. want would require reading § 706(k) as though it states "the court may allow the prevailing party a reasonable attorney's fee *against the party found guilty of violating the statute",* words which are conspicuously absent.

Fee shifting ordinarily is intended to ensure that those who act in the public interest will not be forced to shoulder the cost of litigation, rather than to punish law violators. *Wilderness Society v. Morton,* 495 F.2d 1026, 1036 (D.C. Cir. 1974), *rev'd on other grounds, sub nom. Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975). Nothing in § 706(k) or its legislative history indicates that Congress thought otherwise. On the contrary, in enacting 42 U.S.C. § 1988 Congress was fully aware of the opinion in *Wilderness Society* which preceded this Court's decision in *Alyeska.*

In deciding that a winning defendant should not ordinarily get its fees paid by the plaintiff, this Court mentioned two considerations, both of which support fee awards to winning plaintiffs in the usual case: (1) a Title VII plaintiff is the chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority and (2) when a plaintiff is awarded attorneys' fees, they are awarded against a violator

[6] As stated in *Charles v. Daley,* 846 F.2d 1057, 1064 (7th Cir. 1988), *petition for cert. filed,* 57 U.S.L.W. 3314 (Oct. 20, 1988) (No. 88-664), the only question is: "Did the plaintiffs in fact prevail *against the intervenors?"*

[7] As explained in *Planned Parenthood v. Citizens For Community Action,* 558 F.2d 861, 871 (8th Cir. 1977), "an award of attorneys' fees is compensatory, not punitive."

of federal law. *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 418 (1978). However, this Court did not hold that *both* considerations are *required*, only that both considerations are ordinarily present and that both of those considerations militate in the same direction. In *Christiansburg*, the fact that both considerations were absent fortified the decision not to require plaintiff to pay the defendant's fees. But nothing in *Christiansburg* indicates that *one* of them is not enough. And while both of those considerations are ordinarily present, the private plaintiff's incentive to enforce an important national policy is clearly the more important.

As this Court observed, the two purposes that emerge from the legislative history are:

> First, Congress desired to "make it easier for a plaintiff of limited means to bring a meritorious suit" [and] second, . . . Congress intended to "deter the bringing of lawsuits without foundation."

Id. at 420. Those are, indeed, the *only* two purposes of § 706(k) — not to punish law violators.[8]

Absent fee-shifting, a winning plaintiff's recovery is diminished by the expense he incurs in order to obtain the relief sought. This is the major criticism of the American Rule.[9] But the American Rule may be changed by statute or contract. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967). Once the American Rule is reversed, as it has been under Title VII (at least for plaintiffs), a losing party can no longer enjoy its protection. The losing side perforce becomes obligated to repay the winning plaintiff's attorneys' fees, simply because the loser's opposition is what caused those attorneys' fees to become necessary.

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[8] *Kentucky v. Graham*, 473 U.S. 159 (1985), is inapposite because the plaintiff there did not prevail against the defendant against whom fees were sought.

[9] See authorities listed generally in *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240, 270 n.45 (1975); Note, *Attorney's Fees: Where Shall The Ultimate Burden Lie?*, 20 Vand. L. Rev. 1216 (1967).

The union's argument that it is not liable under § 706(k) because it was innocent of the underlying violation is flawed in the same respect as was its defense in *Zipes v. Trans World Airlines*, 455 U.S. 385 (1982). In *Zipes*, the union resisted the relinquishment of a small portion of each of the incumbent's seniority on the ground that the union itself had not been found guilty of discrimination, a contention which this court found "meritless". *Id.* at 399. Six years earlier, *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), held that seniority relief cannot be denied to Title VII victims on the ground that it diminishes the expectations of innocent incumbents, because that would frustrate the make whole objective of Title VII. *Id.* at 774.

This situation is analogous to recovery from an "innocent" bona fide purchaser of an article that was stolen from the plaintiff. It is the plaintiff's superior right to the thing in the hands of the innocent converter that controls; the absence of fault on the part of the converter is irrelevant. Just as the plaintiffs had a superior right to the seniority held by the union members, Congress has determined that the plaintiffs' right to get their fees paid is paramount. By not mentioning any countervailing equities, Congress must be taken to mean that the plaintiff's right to attorneys' fees is superior to the rights of *any* adversary over whom the plaintiff prevails.

B. There Is No Basis For Exempting Intervenors From § 706(k)[10]

Nothing in the language of § 706(k) limits the species of litigant against whom an award may be made and nothing in it exempts any species of losing parties from the burden of paying the attorneys' fees of the successful plaintiff. The absence of language in either § 706(k) or § 1988 restricting the parties against whom fees may be awarded stands in contrast to the Age Discrimination in Employment Act, 29 U.S.C. § 626(b) (incorporating the Fair Labor Standards Act, 29 U.S.C. § 216(b)), where liability for the winner's attorneys' fees can be imposed only on the "defendant". Congress clearly knows how to limit fees liability when it wishes to do so. *See also*, Federal Water Pollution Control Act, 33 U.S.C. § 1367(c).

[10] The courts unanimously hold that fee awards are available against voluntary intervenors opposing relief to plaintiffs, except when they function as plaintiffs asserting rights covered by § 706(k) or § 1988. *See Charles v. Daley*, 846 F.2d 1057 (7th Cir. 1988); *Allen v. Terminal Transport Co.*, 653 F.2d 1016 (5th Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); *Haycraft v. Hollenbach*, 606 F.2d 128 (6th Cir. 1979); *Moten v. Bricklayers, Masons and Plasterers*, 543 F.2d 224 (D.C. Cir. 1976); *S&R Wrecker Service, Inc. v. Mecklenburg County*, 652 F. Supp. 527 (W.D.N.C. 1987); *Akron Center for Reproductive Health v. City of Akron*, 604 F. Supp. 1268 (N.D. Ohio 1984); *Thompson v. Sawyer*, 586 F. Supp. 635 (D.D.C. 1984); *May v. Cooperman*, 578 F. Supp. 1308 (D.N.J. 1984); *Decker v. U.S. Dept. of Labor*, 564 F. Supp. 1273 (E.D. Wis. 1983); *Vulcan Society of Westchester County, Inc. v. Fire Department of the City of White Plains*, 533 F. Supp. 1054 (S.D.N.Y. 1982); *Robideau v. O'Brien*, 525 F. Supp. 878 (E.D. Mich. 1981); *Planned Parenthood Ass'n v. Commonwealth of Pa.*, 508 F. Supp. 567 (E.D. Pa. 1980); *Wis. Socialist Workers 1976 Campaign Comm. v. McCann*, 460 F. Supp. 1054 (E.D. Wis. 1978).

The cases cited by the union as *contra* (Brief for Pet. at 26-27) are inapposite. In *Tunstall v. Office of Judicial Support*, 820 F.2d 631 (3d Cir. 1987), the party involved was a *defendant*. In *Annunziato v. The Gan, Inc.*, 744 F.2d 244 (2d Cir. 1984), an innocent defendant was "caught in the cross-fire between plaintiffs and the [defendant]", *id.* at 255, in that it was brought into the case against its will. In *Natural Resources Defense Council, Inc. v. Thomas*, 801 F.2d 457 (D.C. Cir. 1986), fees were denied because the language of the Clean Water Act, § 505(d), 33 U.S.C. § 1365(d), ("where appropriate") was different than the § 1988 standard of "prevailing parties", the same basis for the decision in *Sierra Club v. EPA*, 769 F.2d 796 (D.C. Cir. 1985). In *Richardson v. Alaska Airlines, Inc.*, 750 F.2d 763 (9th Cir. 1984), fees were denied because under the ADEA they are available only against an offending employer.

Carving out an exception for intervenors cannot be justified on the theory that Congress did not have intervenors in mind. Section 1988 uses the same wording as § 706(k) and both statutes should be interpreted in a similar manner. *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 559-560 (1986).[11] Section 1988 was enacted to correct the "gap" pointed out in *Alyeska*.[12] Congress was surely aware of the fact that in *Alyeska* the party against whom fees were sought and denied was an intervenor. Also, the legislative history cited with approval *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala.), *aff'd mem.*, 409 U.S. 942 (1972), where fees were assessed against intervening legislators. S. Rep. No. 1011 at 3 n.3.[13]

Congress recognized that civil rights plaintiffs are less likely to recover damages, rather than non-monetary relief, and therefore less likely to attract lawyers who might otherwise be willing to look to contingent fees. In Title VII cases, money damages are not available, only backpay under § 706(g), 42 U.S.C. § 2000e-5(g), when the court in its discretion deems it proper. Moreover, because of the greater likelihood of non-monetary relief, any Title VII plaintiff can expect to encounter intervenors more frequently than in other cases. Granting exemption from § 706(k) to intervenors would thus undercut the availability of lawyers for plaintiffs in precisely the kinds of cases in which they have the most difficulty attracting lawyers.

Imposing the winning plaintiff's attorneys' fees upon an intervenor whose opposition was unsuccessful is not inequitable. Awarding compensation to a winning plaintiff accomplishes the purpose of the fee-shifting statute, and has the salutary effect of making an intervenor think twice before entering the fray.

[11] The legislative history of § 1988 shows the same purpose as § 706(k) – to encourage private citizens to initiate court action to correct violations of the Nation's civil rights statutes. *See* H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976).

[12] *See* H.R. Rep. No. 1558 at 2. *See also* S. Rep. No. 1011, 94th Cong., 2d Sess. 1, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908.

[13] Congress also explicitly contemplated "defendant-intervenors", albeit as potential enforcers of Title VII. *Id.* at 4 n.4.

III

THE UNION WAS NOT A FUNCTIONAL PLAINTIFF

Section 706(k) arms a plaintiff with a sword and a shield, both of which stem from the underlying Congressional purpose of obtaining private enforcement. When a plaintiff wins, he gets his attorneys' fees reimbursed as a matter of course, absent special circumstances. *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 416 (1978); S. Rep. No. 1011 at 4. When a plaintiff loses, he must pay the winning defendant's fees only when the case is frivolous, unreasonable or groundless. *Christiansburg*, 434 U.S. at 424; S. Rep. No. 1011 at 5. The plaintiff's shield serves the purpose of assuaging concern about the cost of losing, thereby furthering the Congressional purpose of encouraging private enforcement. For that reason, a plaintiff is entitled to the shield only when he brings into court an alleged violator of Title VII and seeks redress for that violation. Only then can he be regarded as a "plaintiff" within the meaning of § 706(k) and *Christiansburg*.

The formal labels "plaintiff", "defendant" and "intervenor" are not helpful in assessing responsibility for the fees of the winning party. For example, if an employer brought an action seeking a declaratory judgment over the legality of a new promotion policy, he would be regarded as a "plaintiff" under the Federal Rules of Civil Procedure but he would not be entitled to the benefits of § 706(k). The real question is whether the losing party acted like a plaintiff or a defendant.

Only when an intervenor presents a claim of a violation of Title VII and seeks redress for it can he be characterized as a party taking part in the eradication of discrimination. Only then does an intervenor have Congress' encouragement to act as a "private attorney general"; only then can an intervenor be regarded as a "functional plaintiff"; and only then does he earn the shield of *Christiansburg*.[14] If the rights asserted by an intervenor fall short of those that Congress deemed worthy of encouraging via fee-shifting, the intervenor has no claim to the mantle of a "functional plaintiff" or the protection of *Christiansburg*.

[14] *See Reeves v. Harrell*, 791 F.2d 1481 (11th Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987); *Grano v. Barry*, 783 F.2d 1104 (D.C. Cir. 1986); *Kirkland v. New York State Dept. of Correctional Services*, 524 F. Supp. 1214 (S.D.N.Y. 1981).

The union did not qualify for protection under *Christiansburg* as a "plaintiff" because the union asserted neither a Title VII claim nor any other claim covered by a fee-shifting statute. Moreover, the nature and extent of the union's opposition to the plaintiffs' quest for relief places it even farther away from its desired status as a "functional plaintiff". The union challenged not only the restoration of the plaintiffs' competitive seniority, but the entire settlement agreement, arguing that the Court lacked jurisdiction. *Zipes v. Trans World Airlines*, 455 U.S. 385, 391 (1982). If the union had its way, the Sub-Class B plaintiffs would have taken nothing by their suit, just as surely as if TWA had prevailed on the merits.[15]

In fact, the procedural history of this case demonstrates that from the beginning the union was a wolf in sheep's clothing. When it filed the complaint, the union purported to be the class representative of the former stewardesses. At that time, the union wanted an end to TWA's no-mothers policy for the benefit of the incumbents (union members). Section 706(g) made it clear to the union that re-employment and retroactive seniority were available to the former stewardesses, both of which were *antagonistic* to the union's members. In the settlement agreement negotiated with TWA, the union gave up any meaningful right to re-employment (at least to the extent that it would have any adverse affect on the incumbents[16]), and gave up all rights to retroactive seniority. In order to get what the union wanted, it also gave up all of the plaintiffs' claims for backpay and company seniority. That was of value to TWA and cost the union nothing. The use of that bargaining chip to benefit the incumbents illuminated the union's conflict of interest.

[15] Even as to the Sub-Class A plaintiffs, the union argued that the District Court could not award retroactive seniority in derogation of the employment agreement between TWA and the incumbent employees.

[16] The settlement provided for re-employment only when openings occurred.

After the union was ejected as the plaintiffs' class representative, the union was not heard from again until the plaintiffs achieved their hard won settlement. At that point, the union asserted the very argument which TWA had given up in the 1979 settlement — the jurisdictional challenge to plaintiffs' entire case. If the union had its way, the plaintiffs would have walked away with nothing, as surely as if TWA had won the case. The union could not have chosen grounds for combat more typical of a defendant.[17]

Essentially conceding that the union did not assert the kinds of rights which elevate it to a private attorney general, *amicus* E.E.O.C. suggests that an intervenor should be immune from § 706(k) fee awards whenever the views it presents at the relief stage are merely important or socially desirable. However, had Congress desired to immunize intervenors who present arguments that are "important" (either to the intervenor or society, generally), it could easily have done so.[18] There is simply nothing in the language of § 706(k), § 1988, or their respective legislative histories that supports this attempt to carve out an exception to the "prevailing party" standard.

Amicus E.E.O.C. and the union similarly argue that the imposition of fee awards would have a "chilling effect" upon intervenors who desire to contest the claims of Title VII plaintiffs for relief. Concern about "chilling" is precisely one of the two principal underpinnings of the American Rule. *Cf. Rich v. United States,* 417 U.S. 116, 130 (1974). But the American Rule was reversed in 706(k) as to those who choose to oppose plaintiffs in Title VII cases. *See Christiansburg,* 434 U.S. at 415-416.[19]

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[17] That the union was not "required" to intervene on account of its duty of fair representation is explained at length in the Seventh Circuit's opinion below. (P.A. 14a-16a)

[18] For example, in the Toxic Substances Control Act, 15 U.S.C. § 2605 (c) (4) (A), Congress provided for fee awards to persons who represent "an interest which would substantially contribute to a fair determination of the issues to be resolved in the proceeding."

[19] In the context of § 706(k), the "chilling effect" argument is atavistic. Under the English Rule, where the loser pays as a matter of course, no one would give a second thought to imposing upon an intervenor the attorneys' fees of the party who prevailed against him.

In any event, the argument that the expressions of the union's points in *Zipes v. Trans World Airlines,* 455 U.S. 385 (1982), were important and socially useful is belied by the contrary assessments of both this Court and *amicus* E.E.O.C. in *Zipes*. The union argued there that the plaintiffs' settlement could not be approved for lack of subject matter jurisdiction and that, in any event, because the case was settled without an adjudicated finding that TWA had violated Title VII, the predicate for relief was missing. This Court found both arguments to be "without merit".[20]

In its brief in *Zipes* (Nos. 78-1545 and 80-951), amicus E.E.O.C. observed: "there is no merit to either of [the union's] contentions" (at 9); "there is no merit to IFFA's contention that seniority may never be restored in a settlement without the consent of a non-party union representing incumbent employees" (*id.* at 9-10); "IFFA's contention that a settlement may not provide for the restoration of seniority without the approval of a union that is not a defendant, and thus has no potential liability . . . is both extravagant and flatly inconsistent with Congress' intent" (*id.* at 26-27).

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[20] After disposing of the jurisdiction argument, this Court concluded that the second contention "is also without merit", 455 U.S. at 398, and stated: "Equally meritless is the union's contention that retroactive seniority contrary to the collective-bargaining agreement should not be awarded over the objection of a union that has not itself been found guilty of discrimination", *id.* at 399.

IV

IN A CONTEST BETWEEN TWO GENUINE PLAINTIFFS, THE LOSING PLAINTIFF SHOULD PAY THE ATTORNEYS' FEES OF THE WINNING PLAINTIFF

A. In Contests Between Plaintiffs, The Defensive Protection Of *Christiansburg* Should Be Eliminated

Once the labels are cast aside and meaningful analysis has determined whether the contending parties are functional plaintiffs or defendants, it is apparent that only rarely will plaintiffs oppose each other in Title VII or civil rights cases. The likelihood of two parties opposing one another, *each* of whom either asserts a violation against the other or seeks redress from the other for a violation, is slim. It would seem that it can occur only when a Title VII or civil rights lawsuit results in an order which is then challenged as being a violation (of Title VII, etc.).[21]

In that sort of deadlock, it is literally impossible for both plaintiffs to enjoy both the shield and sword of *Christiansburg*. Several reasons favor elimination of the defensive shield, and that the winning plaintiff should receive compensation for his attorneys' fees from the losing plaintiff.

Since the goal established by Congress is to encourage private enforcement, the solution should adopt whatever is most likely to enhance private enforcement. However intimidating it might be to a plaintiff to contemplate paying the attorneys' fees of the "plaintiff" he is about to sue, it would seem that it will be outweighed by the prospect of receiving *his* attorneys' fees if he wins, providing he has a greater than 50% confidence of

[21] Two such cases are *Prate v. Freedman*, 583 F.2d 42 (2d. Cir. 1978) and *Baker v. City of Detroit*, 504 F. Supp. 841 (E.D. Mich. 1980) *aff'd, sub nom. Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). In those cases, the "second plaintiff" accused the original plaintiff not of a violation in the usual sense but, rather, of instigating or supporting a violation by obtaining an order that violated Title VII.

winning. For the same reason, would-be plaintiffs who have less than 50% confidence will be less likely than otherwise to file suits in cases that pit plaintiffs against one another. The result of the foregoing suggestion is likely to be that more cases will be filed in which plaintiffs are relatively confident, and fewer cases in which plaintiffs are less than sanguine.

Here, even if it had been the case that the union was truly a "functional plaintiff", the choice would be between: (a) an innocent victim of a Title VII violation who, having demonstrated a right to relief, was put to added litigation expense in order to obtain redress; and (b) an intervenor who, while innocent of the underlying violation, was the party who imposed those additional costs upon the plaintiff. In making the choice, it would have to be kept in mind that the union's opposition was not "rightful". After all, the reason why the union lost was that its position was without merit.

B. Attorneys' Fees For The Work Made Necessary By A Plaintiff-Intervenor Should Not Be Imposed On The Original Defendant

In a contest between a plaintiff and an intervenor-plaintiff, one possible solution too obvious to ignore would impose the winner's attorneys' fees on the original wrongdoer-defendant. That is not a good solution.

In the case of a settled lawsuit, that would be contrary to the policy of encouraging settlements. A wrongdoer defendant who settles typically and understandably has the motive and expectation of quantifying his total cost and terminating his involvement in the proceedings. Subjecting a settling wrongdoer defendant to open-ended liability for attorneys' fees made necessary thereafter by a party not under his control would serve as a disincentive to settle.[22]

[22] Of course, settlements are encouraged. *ALSSA v. Trans World Airlines*, 630 F.2d 1164, 1166-7 (7th Cir. 1980).

That rule would also be unworkable in fully litigated cases, inasmuch as the tenacity and vigor of an intervenor's later litigation posture, and hence the amount of attorneys' fees that will later flow therefrom, are unpredictable.[23] In this case in particular, TWA could not reasonably be expected to anticipate that the union would assert lack of jurisdiction — the very argument that TWA gave up by settling.

In any event, inasmuch as the union does not come close to being a "functional plaintiff", these questions ought not be addressed in this case.

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[23] In *Avoyelles Sportsmen's League v. Marsh,* 786 F.2d 631 (5th Cir. 1986), plaintiff prevailed against the government, but the government was held to be not liable for fees in the later phase of the litigation in which plaintiff was opposed by other parties. *Id.* at 632, 637.

CONCLUSION

The issue on which the Seventh and Eleventh Circuits disagree is not appropriate for decision in this case because the union was not a functional plaintiff. Consequently, the writ of certiorari should be dismissed. In any event, the judgment of the Seventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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No. 88-608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Petitioner,
v.

ANNE B. ZIPES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. IFFA DID NOT ACT LIKE A DEFENDANT, DID NOT VIOLATE THE LAW LIKE A DEFENDANT, IS NOT A FUNCTIONAL DEFENDANT, AND SHOULD NOT BE TREATED AS A WRONGDOER DEFENDANT FOR ATTORNEY'S FEES PURPOSES

Plaintiffs' Brief [1] is more notable for what it does not dispute or discuss than for what it does.[2] The core of

[1] References to Plaintiffs' Brief will be denoted as "Pl. Br. ——."

[2] For example, Plaintiffs do not dispute (because they cannot) that (1) the settlement effectively cost 159 Flight Attendants their jobs; (2) Plaintiffs' counsel was paid more than $1,250,000 from the settlement fund which included the use of a "multiplier" of two (and effectively paid counsel hourly wages as high as $300 per hour); and (3) the typical class member received approximately $2,000 in backpay as compensation for being deprived of her job for 15 years. Plaintiffs also acknowledge that Subclass B members (who

Plaintiffs' position, however, seems to be that IFFA should be characterized as a "functional defendant" and not as a "functional plaintiff." For numerous reasons, this argument cannot stand.

Although it seems elementary, the proper starting point for this analysis is the basic meaning of the terms "plaintiff" and "defendant." Like a plaintiff, IFFA came into court complaining that what TWA and the Plaintiffs had agreed to ask the court to order would injure IFFA and its members. Unlike a defendant, IFFA was never accused of committing a legal wrong. If one term or the other must be chosen, clearly IFFA's behavior was more akin to that of a plaintiff than that of a defendant.

The centerpiece of Plaintiffs' theory is that IFFA must be a functional defendant because it was opposed by Plaintiffs. But that contention makes no sense, for IFFA was opposed by *both* Plaintiffs *and* adjudicated wrongdoer defendant TWA. The emphasis should not be on who opposes the innocent third-party, but instead on *why that innocent third party is present in the litigation.* Thus, the intervenors in *Reeves v. Harrell*, 791 F.2d 1481 (11th Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987), were not contending that the defendants had violated their rights *ab initio*, but only that what plaintiffs and defendants had agreed to do and what the court had ordered pursuant to the settlement of the plaintiffs' claims violated their rights, and therefore those intervenors were considered "functional plaintiffs." IFFA found itself in precisely the same position.

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constitute 92% of the class) were not the subject of timely charges filed with the EEOC. (Pl. Br. 2). Moreover, Plaintiffs do not bother to discuss the union's duty of fair representation (except to state that they agree with the Seventh Circuit Panel majority); or the procedures which this Court has indicated must be followed in Title VII remedial proceedings and the role the union (which is not an adjudicated wrongdoer defendant) must play in those proceedings as articulated in *Teamsters v. U.S.*, 431 U.S. 324 (1977); or even the very "special circumstances" of this case.

Indeed, Plaintiffs admit that the formal litigation labels the parties bear are "not helpful in assessing" liability for fees. (Pl. Br. 12). We agree that "The real question is whether the losing party acted like a plaintiff or a defendant." (*Id.*). It is worth noting, however, that in adopting this position Plaintiffs are seriously undercutting and exposing the frailty of the rationale of the Panel majority below. If the courts are indeed to look beyond the litigation labels and analyze who the parties truly are, then there is no real danger that wrongdoer defendants will be able to successfully "cloak themselves" with phony claims in order to avoid liability for fees.

There is no doubt that the courts not only should, but can make these determinations. Plaintiffs persuasively make this point themselves by noting that the legislative history of 42 U.S.C. § 1988 cites *Sims v. Amos*, 340 F.Supp. 691 (M.D. Ala.), *aff'd mem.* 409 U.S. 942 (1972). While it is true that the legislators who intervened in *Sims* were assessed fees, it is clear from the opinion that those legislators are the parties who *actually deprived plaintiffs of their rights.* Thus, when the intervenors are true defendants who actually violated the law, it is appropriate to treat those intervenors like defendants for attorney's fees purposes. But when the intervenors are parties who did not deprive the plaintiffs of their rights, and who are suffering a deprivation of their own rights although they did no wrong, it is appropriate to treat those intervenors like plaintiffs for attorney's fees purposes.

Given Plaintiffs' admission that the Court must look beyond the litigation labels, Plaintiffs' other arguments that IFFA should be characterized as a "functional defendant" are quite illogical. We will discuss each in turn.

First, Plaintiffs contend that IFFA must be a "functional defendant" because IFFA was not asserting Title VII rights. Thus, if Plaintiffs are to be believed, a party

who contends that a settlement abridges her rights under Title VII must be characterized as a "functional plaintiff", whereas a party who claims that her rights are being abridged under a collective bargaining agreement safeguarded by the Railway Labor Act or the National Labor Relations Act must be characterized as a "functional defendant." We find such reasoning to be strained at best, and as pointed out by the United States as *amicus curiae* (hereinafter "the Government"), such a distinction would also be impractical and unworkable. *Both* third parties are essentially contending that they have been deprived of legitimate rights even though they have not committed a legal wrong; and *neither* third party had a claim initially, for the claim only arises as a result of what the defendant may agree to do in order to resolve the litigation and/or what the court may order in that regard. Thus, as to both third parties, it is the illegal act of a defendant in violation of the civil rights law that directly caused their loss and their claims. In any event, such a distinction, even if valid, could have no possible relevance here, since an integral part of IFFA's arguments was that the deprivation of its contractual rights at a time when Plaintiffs had not proven that they were subjected to a legal wrong was a taking in violation of the Fifth Amendment guarantee to Due Process of law. (See pp. 24-27 and 35-37 of IFFA's lead Brief and pp. 1-6 of IFFA's Reply Brief in No. 80-951). In addition, throughout the litigation over the settlement IFFA argued that the relief Plaintiffs were seeking was inconsistent with §§ 703(h) and 706(g) of Title VII. (See pp. 27-28 and 31-32 of our lead Brief in No. 80-951). Given these Constitutional and Title VII arguments, which, it must be remembered, were part of a question presented which was worthy of a grant of *certiorari*, there is no basis for treating IFFA differently from other "functional plaintiffs" who may raise such claims.

Second, Plaintiffs contend that IFFA must be construed as a "functional defendant" because, according to Plaintiffs, IFFA attempted to force TWA and Plaintiffs "[T]o continue litigating the claims on the merits (and the question of jurisdiction) to the bitter end, in a winner-take-all contest." (Pl. Br. 3, see also Pl. Br. 13, 14). To the contrary, in the very first paragraph of the Summary of Argument in its lead Brief filed with this Court in No. 80-951, IFFA stated:

> TWA remains free to settle the case by offering the Plaintiffs $3 million or any larger amount which TWA owns; but it cannot diminish its own potential monetary liability by granting to Plaintiffs competitive status seniority inconsistent with the TWA-IFFA contract.

As Plaintiffs know well, IFFA made statements to this effect numerous times throughout the litigation over the settlement. IFFA did not care whether there was a settlement, but cared only about the harm a certain type of settlement would cause to its members. Time and time again IFFA suggested that the proper course was for TWA to pay Plaintiffs more money, and to leave the incumbent employees alone. The case, including the jurisdictional issue, could have been settled at any time, with or without the aid of the court. The presence of the District Court was necessary only to ensure that the collective bargaining agreement and the rights of the incumbent employees could be overridden. In addition, Plaintiffs' "winner-take-all" scenario is belied by the facts. The jurisdictional issue *was* litigated and Plaintiffs won, but Plaintiffs hardly took "all." Indeed, as to backpay, Plaintiffs took very little.

A third argument made by Plaintiffs is that IFFA must be treated as a "functional defendant" because it attempted to frustrate the efforts of Plaintiffs to obtain a "make-whole remedy." (Pl. Br. 4, 5, 9). Plaintiffs seem to forget that they settled quite cheaply. Indeed, *Plain-*

tiffs were not made anything close to whole. The fact that Plaintiffs were not made whole was not caused by IFFA but rather brought about by a serious weakness in Plaintiffs' case which forced them to settle with TWA for something akin to two cents on the dollar. Under these circumstances, there is no basis for assessing fees against IFFA in the name of making Plaintiffs whole. Any thought of a "make-whole" remedy was abandoned by Plaintiffs at the moment they settled.

Fourth, there is also no basis for attempting to draw a distinction between arguments raised by third parties which contest *some aspect* of the relief plaintiffs seek and arguments which could theoretically deprive plaintiffs of *all relief.* Such a rule would lead to the quite illogical result of innocent third parties being penalized if they raised their strongest arguments but not penalized for raising their weaker ones. Such a rule would also severely inhibit incumbent employees from presenting the equities of their position vis-a-vis the settling plaintiffs to the district court, as Justice Powell's concurring opinion in *Zipes I* indicates that they should. It would also, as Justice Powell warned, encourage employers to attempt to "[S]ettle Title VII actions, in part, by bargaining away the rights of current employees." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 401, n. 1 (1982) (Powell, J., concurring). Here, IFFA made it plain that its sole concern was the effect which a grant of seniority to plaintiffs would have upon the incumbents. Having so qualified its interest, it hardly seems just to penalize IFFA because it dared to point out to the District Court that its Court of Appeals had held that there was no subject matter jurisdiction over the claims pursuant to which the court was about to order that grant of seniority.

Fifth, Plaintiffs turn their own argument on its head when they claim that *Tunstall v. Office of Judicial Support*, 820 F.2d 631 (3rd Cir. 1987), and *Annunziato v. The Gan, Inc.*, 744 F.2d 244 (2nd Cir. 1984) are inapposite because the "functional plaintiffs" there who were not assessed fees were *defendants* and not intervenors. Are Plaintiffs saying that *defendants* deserve more protection under § 706(k) than intervenors? We think not. What *Tunstall* and *Annunziato do* demonstrate is that even defendants can be "functional plaintiffs." What links the defendants in *Tunstall* and *Annunziato* with the intervenors in *Reeves*, *Grano v. Barry*, 783 F.2d 1104 (D.C. Cir. 1986), and IFFA here, is not their litigation labels but the fact that each of those parties was deprived of property and/or rights even though it had not violated the law. The reasons for denying fees in each instance has nothing to do with those labels or even the precise nature of the deprivation suffered by these third parties, but rather the fact that none of these third parties had violated the law, and that their loss had been brought about by the acts of the principal defendant which did violate the civil rights laws. As the Government aptly points out, this Court has stated that § 706 (k) must be construed pursuant to traditional considerations of equity. *Christiansburg Garment v. EEOC*, 434 U.S. 412, 418-19 (1978). The purpose of a fee-shifting statute, obviously, is to shift the cost of the litigation from the wronged party to the party who committed the wrong. But where innocent third parties are inevitably harmed by the collateral consequences of civil rights litigation, there simply is no equity in routinely assessing fees against them.

II. IF ALLOWED TO STAND, THE RESULT BELOW WOULD HAVE A SEVERE CHILLING EFFECT UPON THE ADVERSARY JUDICIAL PROCESS TO WHICH CONGRESS ENTRUSTED THE ULTIMATE EFFECTUATION OF THE GOALS OF TITLE VII

Plaintiffs clearly are not very concerned with the chilling effect which the result below undoubtedly will have upon the rights of innocent third parties harmed by the settlement of Title VII cases. By way of reply to the

few, scattered points in Plaintiffs' Brief which address this subject, we make three points.

First, Plaintiffs contend that requiring the original wrongdoer defendant to remain responsible for fees generated by innocent third parties would be "unworkable." (Pl. Br. 18). However, the only reason given in support of this theory is that defendants want to know precisely what their costs are as of the time of settlement and that a contrary rule would therefore allegedly serve as a "disincentive to settle." (Pl. Br. 17). But as we noted in our lead Brief, (1) the situation is quite different when plaintiffs and defendant *know* that the settlement will generate claims by the innocent third parties[3]; (2) if their case is strong enough, plaintiffs can structure a settlement which will allow them to recover such fees from the wrongdoer defendant, and if their case is not strong enough, plaintiffs should not recover from innocent employees what they could not recover from the discriminating employer; and (3) here, a powerful argument can be made that TWA *has already paid* the Plaintiffs for the litigation over the settlement through the seven-figure fees which Plaintiffs' counsel received from the settlement fund. Plaintiffs fail to discuss any of these points. Moreover, the notion that "TWA could not reasonably be expected to anticipate" (Pl. Br. 18) that in attempting to preserve its members' job security IFFA would bring to the attention of the District Court the fact that its Court of Appeals had found a lack of subject matter jurisdiction, is—in a word—absurd.

Second, Plaintiffs argue that the "chilling effect" argument is "atavistic" because under the "English Rule" the "loser pays as a matter of course . . .". (Pl. Br. 14, n.19). But Plaintiffs fail to mention that under the English Rule innocent third parties would be entitled to *recover* attorney's fees if they prevailed. *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240, 247, n.18 (1975). This does nothing to diminish the severe chilling effect which innocent third parties will suffer if they are placed in a situation where they must pay attorney's fees if they lose but cannot recover attorney's fees if they prevail.

Third, Congress entrusted the ultimate effectuation of Title VII to the adversary judicial process. *Christiansburg*, 434 U.S. at 419. This "[P]resupposes both a vigorous prosecution and vigorous defense." *Id.* Surely it also presupposes that innocent third parties harmed by the settlement of a Title VII case will also have an opportunity to vigorously present their claims. As the Government stresses, the result below, if allowed to stand, would cause significant harm to that adversary judicial process. Many innocent employees would be deterred from presenting their claims and would necessarily decide that they could not afford to voice their rights. Plaintiffs, we note once again, simply fail to respond on this critical point.

[3] Both the District Court and Seventh Circuit specifically noted that the parties to the settlement surely knew that IFFA and the incumbent employees would object to certain provisions in the Settlement Agreement. Pet. App. 31a; *Freedman v. ALSSA*, 730 F.2d 509, 514 (7th Cir.), *cert. denied*, 469 U.S. 899 (1984).

III. NOTHING IN THE LANGUAGE OF § 706(k) REQUIRES THE RESULT BELOW

Plaintiffs emphasize that the language of § 706(k) does not say that innocent third parties should be treated as plaintiffs for attorney's fees purposes. Therefore, Plaintiffs argue, since Plaintiffs prevailed against IFFA on the seniority issue, IFFA "must pay" Plaintiffs' attorney's fees under the plain meaning of the statute.

Whatever surface appeal this argument has is exploded by a simple reading of *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) and *Christiansburg*. Section 706(k) also does not say that prevailing plaintiffs should ordinarily recover attorney's fees against ad-

judicated wrongdoer defendants unless special circumstances exist. Nor does the statute say that prevailing defendants should *not* ordinarily recover attorney's fees from unsuccessful plaintiffs unless the plaintiffs' claim was frivolous, unreasonable or without foundation. For whatever reason, Congress chose to leave the language of the fee-shifting provision somewhat vague, entrusting the courts to interpret the statute in a fashion consistent with the purposes of Title VII and, as noted in *Christiansburg*, traditional considerations of equity. *Christiansburg*, 434 U.S. at 420. Accordingly, the Court must decide this case, as it has *Christiansburg*, *Piggie Park*, and numerous others, based upon those purposes and those equitable considerations. The inconclusive language of § 706(k) simply does not address the question presented.

Nor can the result below be upheld by pointing to the discretion which § 706(k) vests in the district court, as suggested by *amicus curiae* American Civil Liberties Union (ACLU). We do not contend that a district court would *never* have discretion to award fees against an intervening third party. But the fact here is that the District Court was exercising no such discretion. Instead, it believed (incorrectly) that an award of fees in favor of Plaintiffs was "almost automatic" pursuant to the fashion in which this Court had interpreted § 706(k) in *Piggie Park* and *Christiansburg*.[4]

[4] The ACLU, curiously, takes what clearly is an anti-free speech position and sides with Plaintiffs. But much of the ACLU brief reads as if it is arguing another case, and we suspect that it is, and that that case is *Charles v. Daley*, 846 F.2d 1057 (7th Cir. 1988), *petition for certiorari pending sub nom. Diamond v. Charles*, No. 88-664, a case in which the ACLU represents the respondents. Obviously, a decision on *Charles* will have to wait for another day. Suffice it to say that the main thrust of the ACLU—i.e., opposition to a "*per se*" prohibition barring a district court, in the reasoned exercise of its discretion, from awarding fees against innocent third parties—is irrelevant to this case. (ACLU Br. p. 3). We do not argue for such a *per se* prohibition, and as noted above the District Court here did not feel free to make such a reasoned exercise of its discretion.

Plaintiffs' other arguments suffer from the same flaws. In arguing that just one of the two factors listed in *Christiansburg* is sufficient to justify an award of fees here, Plaintiffs simply ignore the obvious point that the strongest possible equitable reason for awarding fees against a defendant is that that defendant has violated the law. Plaintiffs also make no effort to explain why the need to encourage private attorneys general has any applicability to the facts of *this case*.[5] Moreover, Plaintiffs fail to mention that the equitable considerations listed in *Christiansburg* as reasons for not routinely awarding fees against plaintiffs read as if the Court was discussing the events which befell this Petitioner in this case. (See *Christiansburg*, 434 U.S. at 422, and our lead Brief at pp. 24-25).

This latter point also dismantles the argument that in a contest between two plaintiffs, the losing plaintiff should pay the attorney's fees of the winning plaintiff. (Pl. Br. 16-17). Again, Plaintiffs fail to discuss the reasons given in *Christiansburg* for not assessing fees against plaintiffs, absent a showing that those plaintiffs had brought frivolous claims. We can think of no reason why those standards would not apply here, and certainly Plaintiffs have offered none. Accordingly, this argument must be rejected as well.

[5] Indeed, all of Plaintiffs' arguments regarding the need to encourage individuals to act as Title VII private attorneys general are generic, and do not deal with the extraordinary circumstances of this case. Regardless of how the issue may arise in other cases, this case obviously must be decided on the facts of this case.

CONCLUSION

The judgment below should be reversed and remanded with instructions to dismiss the claim for attorney's fees against IFFA.

Respectfully submitted,

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April 18, 1989

AMICUS CURIAE

BRIEF

(5)

No. 88-608

In the Supreme Court of the United States

OCTOBER TERM, 1988

INDEPENDENT FEDERATION
OF FLIGHT ATTENDANTS, PETITIONER

v.

ANNE B. ZIPES, ET AL.

*ON A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AND
THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AS AMICI CURIAE SUPPORTING PETITIONER**

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QUESTION PRESENTED

Whether a union that intervened unsuccessfully in an employment discrimination action to challenge relief that it alleged would impermissibly interfere with its collective bargaining agreement should be assessed attorneys' fees pursuant to Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), under the same standard applied to a losing defendant, even though the union has not been found or alleged to have engaged in unlawful discrimination.

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**BRIEF FOR THE UNITED STATES AND
THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AS AMICI CURIAE SUPPORTING PETITIONER**

**INTEREST OF THE UNITED STATES AND
THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

This case presents the important question whether parties who have not violated federal civil rights law and have not litigated frivolously may nevertheless be required to pay attorneys' fees to plaintiffs who prevail in civil rights litigation. The United States and the Equal Employment Opportunity Commission have a strong interest in this issue as principal enforcers of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and other civil rights laws for which attorneys' fees may be awarded. In addition, 42 U.S.C. 2000e-5(k) makes the federal government liable for attorneys' fees to the same extent as a private party. Thus, the United States also has a direct interest in this issue as a potentially liable party. See, *e.g.*, *United States* v. *Richardson*, No. 88-5155 (6th Cir.) (U.S. held liable for fees as plaintiff-intervenor).

STATEMENT

1. Respondents, represented by the predecessor union to petitioner Independent Federation of Flight Attendants (IFFA), filed this class action against Trans World Airlines, Inc. (TWA) in 1970 alleging that its practice of terminating all flight attendants who became mothers, but not those who became fathers, violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 2a. Shortly after the suit was filed, TWA dropped its prohibition on employment of mothers and entered into a settlement with the predecessor union. That settlement, however, did not award either backpay or seniority to class members. *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 388 (1982). Disgruntled members of the class appealed the district court's approval of the settlement and won reversal in the court of appeals based on the union's conflict in representing both the plaintiff class and incumbent flight attendants who were not affected by the "no-motherhood" rule. *Air Line Stewards & Stewardesses Ass'n, Inc.* v. *American Airlines*, 490 F.2d 636 (7th Cir. 1973).

The action was then reinstated with individual class members substituted for the predecessor union as representatives. The district court granted summary judgment for respondents, ruling that TWA had discriminated against them on the basis of gender in violation of Title VII. Pet. App. 3a. The court of appeals affirmed the finding of discrimination, but held that the claims of 92% of the class members were barred by their failure to file timely charges with the EEOC. See *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142 (7th Cir. 1978).[1]

[1] The district court had previously permitted TWA to amend its answer to assert that claims of class members who had not filed timely charges with the EEOC were barred, but denied TWA's motion to exclude those class members, holding that TWA's violation continued so long as its policy remained in effect. *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 388-389 (1982).

The parties then reached a second settlement agreement, establishing a $3 million fund to benefit all class members and awarding each class member full retroactive competitive seniority.[2] Pet. App. 3a.

2. Petitioner, representing all flight attendants who were not adversely affected by the no-motherhood rule, thereupon intervened as a defendant to object to the settlement on the grounds that (1) the failure of some plaintiffs to file timely charges with EEOC left the district court without jurisdiction to approve equitable relief for them, and (2) reinstatement of the plaintiffs with full retroactive competitive seniority would violate the collective bargaining agreement between IFFA and TWA. Pet. App. 3a-4a. After a hearing, the district court rejected these objections and approved the settlement. *Id.* at 3a-4a.

The court of appeals affirmed, holding that the district court had jurisdiction to approve the settlement and that the grant of retroactive competitive seniority was a proper Title VII remedy. *Air Lines Stewards & Stewardesses Ass'n* v. *Trans World Airways, Inc.*, 630 F.2d 1164 (7th Cir. 1980). IFFA then petitioned successfully for certiorari. This Court consolidated IFFA's petition with the respondents' petition for review of the Seventh Circuit's earlier decision holding that failure to file claims with the EEOC presented a jurisdictional barrier. The Court held that the failure to file with the EEOC was not a jurisdic-

[2] "Seniority" ordinarily determines an employee's entitlement to benefits earned during employment. "Competitive seniority," by contrast, "is used to allocate entitlements to benefits *among competing employees*," including shift assignments and vacation scheduling. Pet. App. 4a n.2.

tional defect and that reinstatement of respondents with full competitive seniority was appropriate. *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982).

3. Respondents then sought an award of attorneys' fees against petitioners under Section 706(k) of Title VII, 42 U.S.C. 2000e-5(k) (1982). Although respondents' attorneys had already been awarded some $1.25 million in fees from a settlement fund established by defendants (Pet. App. 14a), the district court awarded them an additional $180,915.84 against petitioner under the statute. *Id.* at 37a, 38a-40a.

Petitioner again appealed, and the court of appeals again affirmed. The court rejected petitioner's contention that it should not have to pay fees because it was not responsible for the discriminatory conduct that produced liability. Pet. App. 6a-13a. The court noted that the language of the statute provides that prevailing parties should recover attorney fees and does not exclude any class of litigants from liability. *Id.* at 11a. The court also rejected petitioner's contention that it had acted in a manner analogous to a plaintiff when it intervened to protect its members' rights, and thus should only be assessed fees under the same circumstances as would a plaintiff. The court found that any rule that treated intervenors as "functional plaintiffs" would induce defendants and intervenors to manufacture appropriate defenses in order to claim immunity from fee liability. It concluded that the exception would therefore undermine Congress's intent to ensure that meritorious civil rights complaints are fully litigated, and suggested that any problems with the fee provision be addressed to Congress. *Id.* at 12a-13a. Finally, the court rejected the contention that any "special circumstances"—such as petitioner union's duty to represent its members' interests or the fact that respondents had already recovered a large sum from the defendant—excused petitioner from paying the fee award. Pet. App. 13a-16a.

The dissent (Pet. App. 18a-21a) stressed that the union was not responsible for TWA's discrimination and that it sought only to assert the collective bargaining rights of incumbent employees. It noted that "it certainly would have been unusual for [petitioner] to simply ignore a settlement that substantially altered its contract with TWA and the job security of its members," and that the statutory purpose of "encourag[ing] plaintiffs to bring suit against defendants who violate federal law" is not served by an award against "intervenors like [petitioner] who did not violate Title VII." *Id.* at 20a-21a. It also concluded that "denying fee awards against such intervenors will not significantly diminish plaintiffs' ability to attract counsel," pointing out that in this case "[respondents'] counsel has already received more than $1,250,000 from the $3,000,000 settlement." *Id.* at 21a. The dissent predicted that the court's interpretation of the statute would disserve the goal of fair settlement of civil rights claims by deterring employees whose rights were affected by the settlement from asserting their interests. *Id.* at 21a.

SUMMARY OF ARGUMENT

A. This case presents the question whether a losing intervenor in Title VII employment discrimination litigation, who is not alleged to have violated the civil rights of any party, should be treated as a losing defendant for purposes of the fee recovery by a plaintiff. Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), provides that a district court may, in its discretion, award attorneys' fees to a "prevailing party" in Title VII litigation. This Court has invoked three policy considerations in applying this undifferentiated statutory language in different contexts.

First, the Court has noted that the statute is designed "to encourage individuals injured by racial discrimination to seek judicial relief." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-402 (1968). This consideration is qualified by the fact that fees may also be awarded a defendant under Section 706(k). Thus, the statutory purpose is most accurately described as encouraging plaintiffs to bring meritorious claims. *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 420 (1978).

The second consideration follows from the fact that when a court awards fees to a plaintiff against a defendant, "it is awarding them against a violator of federal law." *Christiansburg Garment*, 434 U.S. at 418. An award of fees therefore serves the equitable purpose of redressing a wrong, and of deterring similar wrongs in the future.

Finally, the fact that the fee provision permits awards to either "prevailing party" indicates that Congress "entrusted the ultimate effectuation of * * * [its civil rights] policy to the adversary judicial process." *Christiansburg Garment*, 434 U.S. at 419. Fees should therefore be awarded in such a way as to encourage the consideration of all competing rights and interests in any dispute.

Balancing these considerations, this Court has determined that plaintiffs and defendants warrant different treatment under the fee provision. Losing plaintiffs are required to pay fees only if their actions are "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith" (*Christiansburg Garment*, 434 U.S. at 421); losing defendants, by contrast, are ordinarily required to pay fees to prevailing plaintiffs, "unless special circumstances would render such an award unjust" (*Piggie Park*, 390 U.S. at 401-402).

B. The same considerations indicate that losing intervenors who have not violated any of the plaintiff's civil rights should also be subject to the standard of *Christiansburg Garment*. In the case of an intervenor seeking to protect its own civil rights, all three considerations point to this result. The intervenor, like the plaintiff, is seeking to vindicate its civil rights; the intervenor cannot be described as a violator of federal civil rights laws; and the intervenor should be encouraged to advance its claims in order to ensure a complete consideration of all competing rights and interests by the court.

The same result should follow if, as was the case here, the intervenor seeks to vindicate non-civil rights claims like those grounded in a collective bargaining agreement. Such an intervenor, like the intervenor asserting a civil rights claim, cannot be said to be a violator of federal law, and should be encouraged to come forward in order to provide a complete adjudication of all claims. Moreover, an attempt to distinguish between "civil rights" claims and "non-civil rights" claims would lack any principled basis, would encourage evasive pleading, and would generate unproductive litigation.

Although the question is somewhat closer, we also feel that the same rule should generally apply to an intervenor who asserts an argument, like the claim made here that the district court was without jurisdiction to approve the settlement, that would defeat the plaintiff's right to any recovery. Like the intervenor who advances arguments that go only to the scope of relief, the intervenor who challenges the plaintiff's case on the merits is not a civil rights violator, and is trying to protect an interest that should be considered by the court. Moreover, it would be hard to justify a rule that would apply a different standard for awarding fees to different types of legal arguments, where those arguments are advanced by the same person for the same purpose and are equally meritorious.

C. In short, the considerations that justify the presumptive assessment of fees against defendants under Section 706(k) do not similarly justify the presumptive award

of fees against intervenors. As a non-violator of civil rights laws, a losing intervenor should be treated in the same manner as a losing plaintiff: it should be assessed fees only upon a finding that its action was frivolous, unreasonable, or without foundation.

ARGUMENT

INTERVENORS SHOULD BE TREATED LIKE PLAINTIFFS RATHER THAN DEFENDANTS FOR PURPOSES OF DETERMINING ATTORNEYS' FEE LIABILITY UNDER TITLE VII

This case requires the Court to determine what standard the courts should apply in civil rights litigation when awarding attorneys' fees against an unsuccessful intervenor who has not violated the rights of any other party. The court of appeals concluded that fees should be assessed against an innocent intervenor under the same standard applied to a losing defendant. Petitioner contends that fees should be assessed against it under the standard applied to a losing plaintiff. Unfortunately, the language of Section 706(k) of Title VII of the Civil Rights Act of 1964 (the Act), 42 U.S.C. 2000e-5(k), supplies none of the distinctions that fuel this controversy. That section simply states:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Nor does the legislative history of that provision directly address the problem.

In the absence of any authoritative guidance from Congress, the discretion conferred upon courts under Section

706(k) must be exercised in light of the objectives of the Act and traditional considerations of equity. See *Christiansburg Garment*, 434 U.S. at 418-419; *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 415 (1975). This Court has previously determined that unsuccessful defendants and unsuccessful plaintiffs should be subject to different standards in assessing requests for an award of attorneys' fees. Losing defendants are ordinarily required to pay attorneys' fees "unless special circumstances would render such an award unjust" (*Piggie Park*, 390 U.S. at 401-402).[3] Losing plaintiffs, by contrast, are required to pay attorneys' fees only if they bring actions that are "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith" (*Christiansburg Garment*, 434 U.S. at 421).

This Court's decisions in *Piggie Park* and *Christiansburg Garment* reflect three policy considerations grounded in the purposes of the Civil Rights Act and general notions of equity: (1) encouraging the vindication of meritorious civil rights claims; (2) deterring violations of the civil rights laws; and (3) ensuring that all competing interests and perspectives are fully considered in adversary adjudication. These considerations suggest that an unsuccessful

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[3] *Newman* v. *Piggie Park* concerned a Section 204(b) claim under Title II of the Act. However, "[i]n *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, the Court made clear that the *Piggie Park* standard of awarding attorneys' fees to a successful plaintiff is equally applicable in an action under Title VII of the Civil Rights Act." *Christiansburg Garment*, 434 U.S. at 417. See also *Northcross* v. *Memphis Bd. of Educ.*, 412 U.S. 427, 428 (1973) (applying *Piggie Park* standard to fee provision of Emergency School Aid Act); *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 n.7 (1983) (standards for awarding fees under Section 1988 should be same as those for awarding fees under provisions of 1964 Act). See also S. Rep. No. 295, 94th Cong., 1st Sess. 40 (1975) (fee provision of amended Voting Rights Act should be interpreted according to *Piggie Park* standard).

intervenor who has violated the rights of no other party should be treated like a losing plaintiff.

A. 1. As the Court stated in *Piggie Park,* 390 U.S. at 402, the primary purpose of the fee-shifting provisions of the Civil Rights Act is "to encourage individuals injured by racial discrimination to seek judicial relief." Congress provided for fee awards to successful plaintiffs in order to "make it easier for a plaintiff of limited means to bring a meritorious suit" (110 Cong. Rec. 12,724 (1964) (remarks of co-sponsor Sen. Humphrey)). The provision for fee awards to private plaintiffs was thought necessary because Title VII, as originally passed in 1964, did not allow the EEOC to bring suit to enforce its provisions. See Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VII, § 706(e), 78 Stat. 260.[4] Congress determined instead to rely on private plaintiffs to act as " 'private attorney[s] general,' vindicating a policy that Congress considered of the highest priority." *Piggie Park,* 390 U.S. at 401 and n.2, 402; *Albemarle Paper,* 422 U.S. at 415.

[4] As the Court in *Christiansburg Garment* noted (434 U.S. at 420), the legislative history of Section 706(k) is "sparse." The version of Title VII reported out of committee did not include a fee provision. See H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963). Rather, the provision was part of the "Mansfield-Dirksen amendment," a comprehensive amendment in the nature of a substitute introduced on the floor of the Senate. 110 Cong. Rec. 11,933, 13,310 (1964). The fee provision, along with a provision allowing appointment of attorneys for individual claimants, was apparently inserted after the removal of a provision that gave the EEOC the power to bring civil claims. Compare Section 707(b) of the House version (*id.* at 13,168) with Section 706(e) of Pub. L. No. 88-352, 78 Stat. 260, 42 U.S.C. 2000e-5(e) (1970 ed.). See generally Vaas, *Title VII: Legislative History,* 7 B.C. Ind. & Com. L. Rev. 431, 452-453 (1966). (The power to bring civil charges was later "returned" to the EEOC by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(a), 86 Stat. 104.)

Congress's desire to encourage the private vindication of civil rights claims was, however, qualified. Section 706(k) is not limited to prevailing *plaintiffs,* but applies instead to prevailing *parties.* By allowing awards to parties besides plaintiffs, the fee-shifting provision was designed also to "deter the bringing of baseless actions" (110 Cong. Rec. 13,668 (1964) (remarks of Sen. Lausche (referring to similar Title II provision)). See also *id.* at 14,213-14,214 (remarks of Sen. Miller (Title II)); *id.* at 14,214 (remarks of Sen. Pastore (Title II)). Thus, a more accurate description of the congressional purpose is to encourage the vindication of *meritorious* civil rights claims.

Given the role of meritorious civil rights plaintiffs as the "chosen instrument" of Congress (*Christiansburg Garment,* 434 U.S. at 418), this Court in *Piggie Park* determined that prevailing plaintiffs should ordinarily receive awards of attorneys' fees "unless special circumstances would render such an award unjust." 390 U.S. at 402. Congress declined to disturb this judgment in 1972, when it amended Title VII without changing Section 706(k).[5] And in 1976, Congress explicitly endorsed the Court's reading of the 1964 Act, when it amended Section 1988 to include a fee provision that tracks the wording of Section 706(k) and directed that the interpretation of the new provision should follow that given the Civil Rights Act's pro-

[5] Although the original House version of the Equal Opportunity Act made fee awards only to "prevailing plaintiffs" (see H.R. Rep. No. 238, 92d Cong., 1st Sess. 32 (1971)), the Congress adopted a comprehensive amendment to the bill that left Section 706(k) unchanged, without debate about that section. See 117 Cong. Rec. 31,979-31,980, 32,110-32,113 (1971); Subcomm. on Labor of Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972* 132-147, 314, 326-332 (Comm. Print 1972).

vision.[6] See S. Rep. No. 1011, 94th Cong., 2d Sess. 2, 3, 4 (1976); H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1, 6 (1976); see also H.R. Rep. No. 196, 94th Cong., 1st Sess. 34 (1975) (discussing fee provision amendment to Voting Rights Act).

2. The presumption adopted by *Piggie Park* in favor of awards to prevailing civil rights plaintiffs at the expense of losing defendants also rests on a simple equitable consideration: namely, that those who violate federal law should redress those whose rights have been violated. As the Court observed in *Christiansburg Garment,* 434 U.S. at 418, "when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law." The policy of making violators pay fees also serves the ends of deterrence. As Congress observed, a provision for shifting the cost of attorneys' fees to violators is "ancillary and incident to securing compliance with the[] [civil rights laws], and * * * fee awards are an integral part of the remedies necessary to obtain such compliance." S. Rep. No. 1011, *supra,* at 5. See also *id.* at 2 (fee awards necessary "if those who violate the Nation's fundamental laws are not to proceed with impunity"); *Maine* v. *Thiboutot,* 448 U.S. 1, 11 (1980) (fee awards under Section 1988 are an integral part of remedies to obtain compliance with Section 1983).

Not surprisingly, this Court has consistently linked fee awards with liability for civil rights violations.[7] Thus, in

[6] Given this Court's determination that the language and purposes of the civil rights fee provisions should be interpreted *pari passu* (*Northcross,* 412 U.S. at 428), we will refer, when appropriate, to the legislative history of Section 1988. Cf. *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 379-381 (1969).

[7] Considerations of equity have traditionally guided awards of attorneys' fees. See *Sprague* v. *Ticonic Bank,* 307 U.S. 161, 166 (1939) (historical practice of granting fee awards "is part of the original au-

Hanrahan v. *Hampton,* 446 U.S. 754 (1980), where the plaintiff won the right to a new trial, the Court held that no interim award of attorneys' fees could be made until the plaintiff had established some entitlement to relief on the merits. See *id.* at 758 n.4 (citing *Christiansburg Garment,* 434 U.S. at 418, for proposition that, when a district court awards fees to a prevailing civil rights plaintiff, "it is awarding them against a violator of federal law"). Likewise in *Hensley* v. *Eckerhart,* 461 U.S. 424 (1983), the Court held that a partially successful plaintiff should not recover fees for those portions of a claim on which it did not succeed. In another context, the Court in *Kentucky* v. *Graham,* 473 U.S. 159, 171 (1985), stated repeatedly that "fee and merits liability run together." See *id.* at 164, 165, 168, 170; see also *Grubbs* v. *Butz,* 548 F.2d 973, 976 (D.C. Cir.

thority of the chancellor to do equity in a particular situation"); see also *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y,* 421 U.S. 240, 257-260 (1975). The Court noted in *Alyeska Pipeline* that, under the "American Rule," fees are not normally awarded to a litigant absent "bad faith" by an opponent, "willful disobedience" of a party to a court order, or the existence of a "common fund" benefitting a group from which reimbursement to a party bearing the costs of preserving the fund through litigation may be made. *Id.* at 257-260. Section 706(k) and similar provisions remove the prohibition against fees; courts are not restricted to the equitable prerequisites representing the exceptions to the American Rule. Presumably, however, the discretion retained by the district court is to be exercised in light of the equities of the situation.

Congress has continued to emphasize the importance of equitable discretion in the appropriate administration of the civil rights fee statutes. See H.R. Rep. No. 1558, *supra,* at 6, 8; Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess., *Civil Rights Attorney's Fees Awards Act of 1976, Source Book: Legislative History, Texts, and Other Documents* 164-171 (Comm. Print 1976) (rejecting amendment mandating awards to defendants prevailing over bad faith or frivolous suits); *id.* at 266 (remarks of Rep. Railsback) (emphasizing discretion left to district court).

1976) (concluding on basis of legislative history that no fee award should follow successful interlocutory appeal because "we cannot believe Congress would have countenanced assessing fees against a defendant absent any showing of discrimination") (cited for its legislative analysis in *Christiansburg Garment,* 434 U.S. at 420).[8]

3. Finally, in giving effect to the provision for awards of fees to prevailing defendants, the Court has stressed the importance of ensuring a full adjudication of the controversy. Thus, the fact that fee awards are available to any "prevailing party" not only encourages private plaintiffs to sue but also gives defendants the incentive to mount "a vigorous defense." *Christiansburg Garment,* 434 U.S. at 419. As this Court concluded, "while it was certainly the policy of Congress that Title VII plaintiffs should vindicate 'a policy that Congress considered of the highest

[8] In *Consumers Union of United States, Inc.* v. *American Bar Ass'n,* 470 F. Supp. 1055, 1062-1063 (E.D. Va. 1979), the district court held that an award of fees against a state bar association or its officers would be unjust because these defendants, although named in a suit successfully challenging the constitutionality of the state bar code they administered, had no power to change the code and had unsuccessfully attempted to persuade their co-defendants (the state supreme court and its chief justice), who did have power to change the code, to amend it. This Court disagreed with the district court only on the grounds that the state bar association could be held liable for fees as an agency that enforced the state bar code; it did not controvert the district court's conclusion that, had the state bar association been blameless, a fee award against it would have been unjust. *Supreme Court of Virginia* v. *Consumers Union of the United States,* 446 U.S. 719, 728, 738-739 (1980). See also *Annunziato* v. *The Gan,* 744 F.2d 244 (2d Cir. 1984) (award against blameless intervenor would be "unjust"); *Chastang* v. *Flynn & Emrich Co.,* 541 F.2d 1040, 1045 (4th Cir. 1976) (making no fee award where defendant redressed violation as soon as possible); *Joseph L.* v. *Office of Judicial Support,* 638 F. Supp. 833, 836 (E.D. Pa. 1986) (making no fee award where intervenor innocent of wrongdoing), aff'd on other grounds, 820 F.2d 631 (3d Cir. 1987).

priority,' it is equally certain that Congress entrusted the ultimate effectuation of that policy to the adversary judicial process." *Ibid.* (citation omitted); see also Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess., *Civil Rights Attorney's Fees Awards Act of 1976, Source Book: Legislative History, Texts, and Other Documents* 268 (Comm. Print 1976) (remarks of Rep. Jordan) (fee award amendment to Section 1988 meant to "open the judicial process to everybody who is entitled to use that process * * * [without] prospect of attorney[s'] fees deterring their enthusiasm").

B. Although the foregoing considerations were developed in the context of a traditional bipolar dispute between a plaintiff and defendant, they also are relevant to more complex multipolar disputes. Such disputes can take a variety of forms, and can generate claims for attorneys' fees between plaintiffs and intervenors, defendants and intervenors, and conceivably even between two intervenors.[9]

[9] As Congress has recognized (S. Rep. No. 1011, *supra,* at 4 n.4), "[i]n the large majority of cases the party or parties seeking to enforce [protected] * * * rights will be the plaintiffs and/or plaintiff-intervenors. However, in the procedural posture of some cases, the parties seeking to enforce such rights may be the defendants and/or the defendant-intervenors." See also S. Rep. No. 295, 94th Cong., 1st Sess. 40 n.42 (1975) (substantively same notation, concerning fee provision of Voting Right Act Amendments of 1975).

The courts have in a variety of contexts awarded fees to intervenors raising civil rights claims as prevailing parties. See, *e.g., Commissioners Court* v. *United States,* 683 F.2d 435 (D.C. Cir. 1982) (defendant-intervenors in Voting Rights declaratory judgment suit awarded fees as plaintiffs); *Donnell* v. *United States,* 682 F.2d 240 (D.C. Cir. 1982) (same); *Prate* v. *Freedman,* 583 F.2d 42 (2d Cir. 1978) (defendant-intervenors in suit to set aside consent decree awarded fees as defendants; issue ot applicability of plaintiff's standard not reached); *Baker* v. *City of Detroit,* 504 F. Supp. 841 (E.D. Mich.), aff'd *sub nom. Bratton* v. *City of Detroit,* 704 F.2d 878 (6th Cir. 1983), cert. denied, 464 U.S. 1040 (1984) (defendant-intervenors in reverse discrimination suit awarded fees as plaintiffs); see also *Seattle School Dist. No. 1* v. *Washington,* 633 F.2d 1338 (9th Cir. 1980) (plaintiff-

This case does not call upon the Court to lay down a single rule applicable to all conceivable third-party situations.[10] Rather, it presents only one type of third-party dispute, albeit an important and recurring one: that between a plaintiff and an intervenor who has not been found or alleged to have engaged in unlawful discrimination. In

intervenors in declaratory judgment suit on constitutionality of voter initiative awarded fees), aff'd on other grounds, 458 U.S. 457 (1982); *United States* v. *Board of Educ.*, 605 F.2d 573 (2d Cir. 1979) (plaintiff-intervenor protecting Hispanic interests in formulation of school desegregation remedy awarded fees); *Davis* v. *Board of School Comm'rs*, 600 F.2d 470 (5th Cir. 1979) (plaintiffs-intervenors in school desegregation case awarded fees); see generally, E. Larson, *Federal Court Awards of Attorney's Fees* (1981) (discussing status of intervenor as party for purposes of attorneys' fees).

[10] This brief addresses an intervenor's liability for the payment of attorneys' fees under Section 706(k) of the Civil Rights Act, and closely related provisions (see note 3, *supra*). The purposes and policies of these provisions largely dictate the ultimate liability for the payment of fees. The purposes and policies of other statutory attorneys' fees provisions, however, differ from those underlying the Civil Rights Act and similar statutes. In particular, the purpose of affording awards of attorneys' fees under the "appropriate" standard in numerous environmental laws was to ensure proper implementation and enforcement of the various requirements of those acts, rather than vindication of a plaintiff's individual federal rights. See generally *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680 (1983). Furthermore, a plaintiff or petitioner may be a successful party in such a suit without establishing a past violation of law on anyone's part, because a regulation, permit, or program to govern future conduct may be at issue in the litigation. Therefore, despite this Court's repeated assertions that attorneys' fees statutes should be interpreted *pari passu*, *Pennsylvania* v. *Delaware Valley Citizens' Council*, 478 U.S. 546, 559-560 (1986), the circumstances in which an intervenor should bear the burden of payment of plaintiff's attorneys' fees may differ under statutory schemes other than those associated with civil rights. Accordingly, this brief sets forth the views of the United States only as to attorneys' fees provisions in the civil rights context.

these circumstances, we believe that the foregoing policy considerations suggest that claims for attorneys' fees should be assessed under the standard applicable to unsuccessful plaintiffs rather than defendants.

1. The rationale for treating intervenors like plaintiffs can be seen most clearly in the case of an intervenor who claims that some element of the relief sought by the plaintiff violates its own civil rights. For example, nonminority employees may intervene claiming that numerical relief sought by minority plaintiffs would violate their rights (see, *e.g.*, *Reeves* v. *Harrell*, 791 F.2d 1481 (11th Cir. 1986)); a group of minority employees may intervene to oppose a suit brought by nonminority employees challenging a voluntary affirmative action program (see, *e.g.*, *Baker* v. *City of Detroit*, 504 F. Supp. 841 (E.D. Mich. 1980), aff'd *sub nom. Bratton* v. *City of Detroit*, 704 F.2d 878 (6th Cir. 1983), cert. denied, 464 U.S. 1040 (1984)), or intervene because it disagrees with another minority group about a proper remedy.[11]

In such cases, the policy of encouraging vindication of meritorious civil rights claims cannot be said to favor

[11] Similarly, two classes of plaintiffs might jointly challenge the disparate impact of a hiring procedure, but disagree strongly about the new test to be fashioned. Cf. *Zamlen* v. *City of Cleveland*, 48 F.E.P. Cas. (BNA) 1489, 1494 (N.D. Ohio 1988) (unsuccessful women applicants for firefighter positions challenged, *inter alia*, adjustment of test results made under affirmative action plan for hiring of blacks and Hispanics). It is frequently the case that removing portions of a test that have a disparate impact on one group may actually aggravate the disparate impact on another group. In general, the increasingly "fluid" nature of intervention means that minority groups Congress clearly intended to protect (see H.R. Rep. No. 914, 88th Cong., 1st Sess. 18 (1963)) may increasingly appear as intervenors. See, *e.g.*, *Baker* v. *City of Detroit*, *supra* (blacks intervened to protest reverse discrimination relief); see also *Walters* v. *City of Atlanta*, 803 F.2d 1135 (11th Cir. 1986) (woman attempted to intervene to protest job awarded to man).

either the plaintiff or the intervenor, since *both* are asserting claims grounded in civil rights laws. Insofar as Section 706(k) is intended "to ensure 'effective access to the judicial process' for persons with civil rights grievances" (*Hensley,* 461 U.S. at 429 (citation omitted)), the intervenor is in no different posture than the plaintiff. In such situations, there are, in effect, "two sets of 'plaintiffs' each of which has brought claims in good faith." *Kirkland* v. *N.Y. State Dep't of Correctional Services,* 524 F. Supp. 1214, 1218 (S.D.N.Y. 1981).

Nor would an award against an innocent intervenor serve to deter violations of the federal civil rights laws. By definition, such an intervenor has not violated any of the plaintiff's rights; it is seeking only to vindicate its own rights. An award against a party who is not blameworthy is inconsistent with the equitable considerations that Congress presumably believed would guide the district courts when it gave them the authority to make fee awards in their discretion (see 42 U.S.C. 2000e-5(k)), and that this Court weighed heavily in establishing guidelines for the exercise of discretion by those courts. See *Piggie Park,* 390 U.S. at 402 (prevailing plaintiff should ordinarily recover attorneys' fee "unless special circumstances would render such an award unjust"); *Christiansburg Garment,* 434 U.S. at 418 (presumptive awards to plaintiff justified because made "against a violator of federal law"); see also *Annunziato* v. *The Gan,* 744 F.2d 244, 253 (2d Cir. 1984) (finding fact that intervenor "blameless" to be a "special circumstance"); *Joseph L.* v. *Office of Judicial Support,* 638 F. Supp. 833, 836 (E.D. Pa. 1986) (same); *May* v. *Cooperman,* 578 F. Supp. 1308, 1316-1318 (D.N.J. 1984) (same); Tamanaha, *The Cost of Preserving Rights: Attorneys' Fee Awards and Intervenors in Civil Rights Litigation,* 19 Harv. C.R.- C.L. L. Rev. 109, 145-150 (1984).[12]

[12] But see *Charles* v. *Daley,* 846 F.2d 1057 (7th Cir. 1988) (defendant who intervened to defend constitutionality of abortion statute liable for fees even though not a wrongdoer); *Nash* v. *Chandler,* 848 F.2d 567, 573-574 (5th Cir. 1988) (State of Texas, which intervened solely to defend constitutionality of state statute, may be liable for attorneys' fees, but amount must be adjusted to reflect fact that it was not a wrongdoer); *Haycraft* v. *Hollenbach,* 606 F.2d 128 (6th Cir. 1979) (intervenor who sought to present alternative school desegregation plan liable for attorneys' fees); *Akron Center for Reproductive Health* v. *City of Akron,* 604 F. Supp. 1268, 1274 (N.D. Ohio 1984) (parent intervenors defending constitutionality of abortion statute assessed fees).

Finally, the assessment of fees against an innocent intervenor would undermine the objective of ensuring the full and fair consideration of all conflicting interests and perspectives. If attorneys' fees were routinely awarded against unsuccessful intervenors, such parties would be discouraged from entering the judicial process. This would frustrate the objective of ensuring "effective access to the judicial process" for all those with civil rights grievances. *Hensley,* 461 U.S. at 429 (citation omitted); see, *e.g., Reeves,* 791 F.2d at 1484; *Kirkland,* 524 F. Supp. at 1218-1219.

In other circumstances involving third party interests, this Court has repeatedly stressed the importance of ensuring a full and fair consideration of all affected claims. See, *e.g., Local Number 93, Int'l Ass'n of Firefighters* v. *City of Cleveland,* 478 U.S. 501, 529 (1986) ("parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors"); *W.R. Grace & Co.* v. *Local Union 759, Int'l Union of the Rubber Workers of America,* 461 U.S. 757 (1983); *Ford Motor Co.* v. *EEOC,* 458 U.S. 219, 239-240 (1982). A rule

that would allow attorneys' fees to be presumptively awarded against intervenors would disserve these aims. Moreover, such a result would be especially odd given that an intervenor asserting its own civil rights claim could simply wait until the conclusion of the main case and then file a separate lawsuit, in which case it would clearly enjoy the status of a plaintiff for civil rights attorneys' fees purposes. See Pet. App. 11a-12a.[13]

Thus, the policy considerations that this Court relied upon in *Piggie Park* and *Christiansburg Garment* point to the conclusion that an innocent intervenor who enters a case solely for the purpose of protecting its own civil rights should be treated like a civil rights plaintiff rather than a defendant for purposes of assessing its liability for attorneys' fees.

2. The analysis should be the same in the case of an innocent intervenor who seeks to vindicate rights grounded in some source other than the civil rights laws. This case presents one example, insofar as petitioners were seeking

[13] Such a result would also have the anomalous result of encouraging, rather than discouraging, fragmentation of litigation and delay in the development and implementation of a lasting remedy for discrimination in employment.

Some courts have held that parties who could have intervened in adjudication of a consent decree cannot collaterally attack such a judgment later. See, *e.g.*, *Marino* v. *Ortiz*, 806 F.2d 1144 (2d Cir. 1986), aff'd by an equally divided court, No. 86-1415 (Jan. 13, 1988). It is the position of the United States (see *Martin* v. *Wilks*, Nos. 87-1614, 87-1639 & 87-1668 (argued Jan. 18, 1989)) that such a rule offends the Due Process Clause and is inconsistent with the scheme established by the Federal Rules of Civil Procedure. See U.S. Br. 12-27. We will assume for purposes of this discussion that parties not part of a previous suit can attack the result of that suit later, insofar as it affects their interests. Of course, if this Court holds to the contrary in *Martin*, all parties will be required to intervene in civil rights litigation to protect their rights.

to vindicate their rights under their collective bargaining agreement. See also *Grano* v. *Barry*, 783 F.2d 1104, 1108 (D.C. Cir. 1986) (claim that plaintiffs' action constituted unconstitutional taking); *Richardson* v. *Alaska Airlines, Inc.*, 750 F.2d 763 (9th Cir. 1984) (claim that consent decree in Age Discrimination in Employment Act suit violated collective bargaining rights).

In such cases, there can be no question that the second and third policies discussed above still favor treating the intervenor like a plaintiff. Since the intervenor has not been accused of violating the plaintiff's rights, no equitable purpose or deterrent function would be served by routinely awarding fees. And given the complex state of current civil rights litigation, multiple party participation is desirable in order to ensure adequate consideration of the various interests affected. See Tamanaha, *The Cost of Preserving Rights*, 19 Harv. C.L.-C.L. L. Rev. at 119. As the court in *Kirkland* noted, "[t]he law would not be well served by [discouraging intervention] * * * for, especially in the context of the development of constitutional doctrine and remedies, it is incumbent on the court to consider all the competing interests at stake." 524 F. Supp. at 1219.

It is true in this situation that the plaintiff is seeking to vindicate a claim grounded in the civil rights laws, whereas the intervenor is not. But typically, the intervenor will have entered the case only to protest some aspect of relief sought by the plaintiffs, not to contest the underlying right of the plaintiff to recover. Insofar as the plaintiff will or has already established its right to relief, the policy of providing an incentive to plaintiffs to vindicate their civil rights has been accomplished by the fee award against the defendant.[14]

[14] In cases where the remedial stage of the litigation is prolonged, it may result in some disincentive to the original plaintiffs. It is unclear,

Moreover, we doubt that any distinction that could be drawn between "civil rights" claims and "non-civil rights" claims would be workable.[15] First, it is not clear what claims would qualify as "civil rights" claims. How, for example, would the claim of an unconstitutional taking of property be categorized? See *Grano, supra*. Second, it cannot be said that either Congress or the parties would always regard "civil rights" claims as more weighty or deserving of protection than other types of claims, such as collective bargaining rights (see, *e.g., Richardson* v. *Alaska Airlines*, supra; Pet. App. 20a (Manion, J., dissenting) (petitioner here was at least in some sense obliged to defend its members' rights under the collective bargaining agreement)). Indeed, fee-shifting statutes have become commonplace in recent years, extending far beyond the areas of civil and constitutional rights, and Congress has not established a weighing system for determining which fee statute is to prevail when parties assert conflicting

however, that the disincentive will be significant. First, fees will continue to be available against any party who extends the litigation by making groundless claims, or claims in bad faith. See *Christiansburg Garment*, 434 U.S. at 421. Second, intervenors generally do not enter such litigation lightly, since they cannot expect to receive fee awards for non-civil rights claims. Third, all fees billable to litigation caused by the defendant will continue to be borne by that party. Fourth, if the remedial phase of litigation exhausts a plaintiff's ability to retain counsel, the plaintiff may request a court-appointed lawyer. 42 U.S.C. 2000e-5(f)(1).

[15] Some courts have indicated that their treatment of intervenors may vary depending on whether the intervenor is raising a civil rights claim—in which case the intervenor will qualify as a plaintiff—or a non-civil rights claim—in which case the intervenor may be treated as a defendant. See, *e.g., Reeves*, 791 F.2d at 1484; *Kirkland*, 524 F. Supp. at 1218; see also Tamanaha, *The Cost of Preserving Rights: Attorneys' Fee Awards and Intervenors in Civil Rights Litigation*, 19 Harv. C.R. - C.L. L. Rev. 109, 143 (1984).

claims that would entitle them to fee awards under different statutes. Finally, any distinction between civil rights claims and other claims would only encourage parties to engage in artful drafting, clothing as many claims as possible in constitutional or civil rights garb. Pet. App. 13a. Sorting out the bona fides of such claims, as well as establishing the line between "genuine" civil rights claims and all others, would violate this Court's admonition in *Hensley* v. *Eckerhart*, 461 U.S. at 437, that "[a] request for attorney's fees should not result in a second major litigation."

3. We also think the same result should follow where the intervenor advances an argument—not grounded in an assertion of its own civil rights—that challenges the plaintiff's right to receive any relief at all, although admittedly here the case is somewhat closer. In the present case, for example, petitioner challenged the jurisdiction of the district court to approve the settlement between respondent and TWA insofar as it granted relief to individuals who had not filed timely charges of discrimination with the EEOC. See Pet. App. 4a; *Air Line Stewards & Stewardesses Ass'n* v. *Trans World Airlines, Inc.*, No. 70 C 2071 (N.D. Ill. Sept. 14, 1979). In this situation, of course, the second and third policy considerations still favor treating the intervenor like a plaintiff. The intervenor has not violated the plaintiff's civil rights; it has simply challenged the plaintiff's right to recover against the defendant. And the presence of the intervenor is still desirable in order to achieve a full adjudication of all rights and interests affected by the controversy.

The complicating factor in this situation is that here, unlike in the first two situations, the intervenor is advancing contentions that serve as a greater impediment to the plaintiff's efforts to establish that there has been a violation of its civil rights. Insofar as an intervenor disputes the existence of a civil rights violation, and puts the plaintiff

to proof of the violation, it generates expenses for the plaintiff of the type that Congress intended should be reimbursed under Section 706(k). In fact, insofar as the intervenor asserts contentions that contest the existence of the violation claimed by the petitioner, the intervenor could be described as a "functional defendant." Cf. *United States* v. *Terminal Transport Co.*, 653 F.2d 1016, 1019-1021 (5th Cir. 1981) (considering extent to which union not liable for employer's Title VII violation pressed claims of defendant); *Vulcan Soc'y* v. *Fire Dep't*, 533 F. Supp. 1054, 1061-1063 (S.D.N.Y. 1982) (same). Consequently, it can be argued that the first policy consideration—encouraging plaintiffs to vindicate meritorious civil rights claims—requires that the expenses incurred by a plaintiff in establishing its right to recover, insofar as they are made necessary by the arguments advanced by the intervenor, should be assessed against the intervenor.

For several reasons, however, we think that, on balance, an award of fees against a non-violator intervenor is inappropriate even in this situation.[16] First, an approach that distinguished between arguments that go to the remedy and arguments that go to the existence of an underlying violation would unfairly limit intervenors in the types of

[16] In this regard, it should be noted that *alleged* violators of the civil rights laws as well as *adjudicated* violators may appropriately have fees awarded against them when a case is settled. *Maher* v. *Gagne*, 448 U.S. 122 (1980). In this case, of course, no such allegation was made against petitioner. And while the approach suggested in this brief might encourage parties to amend their complaints after intervention to assert civil rights violations against the intervenor, this does not seem to us to be an undesirable result. If such claims are ultimately adjudicated, then one way or another the appropriateness of a fee award will be resolved; frivolous amendments will, of course, risk an award against the plaintiff; and settlements will not be discouraged because the parties can always include as a part of the settlement an explicit resolution of the fees issue.

claims they could bring. Presumably the intervenor's motivation in entering the litigation would be the same in either event—to protect its own rights or interests. It would be odd, to say the least, to adopt a rule that would subject the intervenor to attorneys' fees if it advanced one type of argument, but not if it advanced another type of argument, when the arguments were otherwise equally meritorious.

Second, the distinction between arguments that go to the merits and arguments that go to the scope of relief would be just as unworkable as the distinction between civil rights claims and non-civil rights claims. Frequently, a challenge to the remedy may include within its scope a challenge to, or a minimization of, the original defendant's liability. This is especially true in the civil rights area, where one of the established elements in determining whether a plaintiff is entitled to affirmative relief is the nature and extent of previous violations of the plaintiff's civil rights. *City of Richmond* v. *J.A. Croson Co.*, No. 87-998 (Jan. 23, 1989), slip op. 22-31; *Johnson* v. *Transportation Agency*, 480 U.S. 616, 627-633 (1987); *United States* v. *Paradise*, 480 U.S. 149, 168-170 (1987); *Local 28, Sheet Metal Workers' Int'l Ass'n* v. *EEOC*, 478 U.S. 421, 448-451, 475-476 (1986). The work of ferreting out "merits" claims and "relief" claims in this situation—and determining how to apportion attorney time between the two—would be substantial and would again threaten to turn attorneys' fee litigation into "a second major litigation." *Hensley*, 461 U.S. at 437.

Finally, although it is always difficult to assign weights to conflicting policy considerations, neither the policy of deterring civil rights violations nor the policy of ensuring the full adjudication of all claims and interests supports treating an innocent intervenor like a defendant—even if the intervenor advances the same arguments that one

would expect a defendant to advance. Thus, even if the policy of encouraging plaintiffs in their attempts to vindicate meritorious civil rights claims might lend some support to drawing a distinction between merits arguments and relief arguments, the other policy considerations identified by this Court do not. On balance, therefore, we think that as a rule all innocent intervenors should enjoy the same status as plaintiffs for civil rights attorneys' fee purposes.

C. When it fashioned Title VII, Congress by all accounts failed to anticipate the role of intervenors in subsequent litigation. It therefore could presume that the incentive to plaintiffs provided by the fee provision would dovetail with the objective of deterring those who had caused the harm. Given the failure of Congress to address the liability of intervenors,[17] and the presumption that parties normally bear their own fees (see *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y,* 421 U.S. 240 (1975)), this Court should not extend the standard it created to guide fee-shifting to defendants from plaintiffs to guide fee-shifting to non-violator intervenors from plaintiffs.

Accordingly, the court of appeals erred when it assessed fees against petitioner under the same standard by which it would assess fees against a losing defendant. As a non-violator of the civil rights laws, a losing intervenor should

[17] The language in the Senate Report accompanying Section 1988 does not indicate more than that Congress intended prevailing intervenors to be awarded fees. See S. Rep. No. 1011, *supra,* at 4 n.4. In fact, Congress's citation of *Shelley* v. *Kraemer,* 334 U.S. 1 (1948), is consistent with a continuing assumption on its part that only wrongdoers would be assessed fees. In that case, the plaintiffs below brought suit to have the defendants, black buyers, enjoined from taking possession of a property governed by a restrictive covenant excluding all but white inhabitants. The plaintiffs were, on the facts of that case, the discriminators.

be treated as is a losing plaintiff: it should be assessed fees only upon a finding that its action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."

The determination that a party has brought claims that were frivolous, unreasonable, or without foundation is committed to the discretion of the district court. Because that court failed to apply the correct standard in assessing fees against petitioner, it did not conduct an inquiry into the merit of the claims made by petitioner. We do not express any views on the merits of those claims, but suggest that this Court remand the case for consideration whether petitioner's conduct at any point was frivolous, unreasonable, or without foundation according to the standard announced in *Christiansburg Garment.*

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE

BRIEF

(6)

No. 88-608

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Petitioner,
v.

ANNE B. ZIPES, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, IN SUPPORT OF PETITIONER

The International Association of Fire Fighters, AFL-CIO ("IAFF"), with the written consents of the parties,[1] respectfully submits this brief amicus curiae in support of petitioner, urging reversal of the decision of the court of appeals below.

INTEREST OF THE AMICUS CURIAE

The IAFF is an unincorporated association comprised of municipal, state, and federal fire fighters throughout the United States and Canada. The current membership

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[1] Letters of consent have been filed with the Clerk of the Court.

includes approximately 153,000 state and municipal fire fighters employed by states, cities, and towns across the United States.

The IAFF's objectives include promoting and securing improved wages, hours, and working conditions of fire fighters through collective bargaining, legislation, legal action, and other appropriate means.

The IAFF here represents the interests of its many local unions which themselves represent members across the country who are employed in cities and towns whose employment rights are now, or may be, affected by the terms of consent decrees entered in settlement of employment discrimination lawsuits to which they are not parties. Most of the jurisdictions employing IAFF members operate pursuant to civil service laws and collective bargaining agreements which set the terms and conditions of IAFF members' employment. When their employers enter into settlements of employment discrimination lawsuits brought by others, IAFF local unions and/or their members are frequently called upon to protect their collectively bargained rights or legislatively granted employment rights, either by intervention in pending lawsuits or by institution of new actions challenging conduct which constitutes unlawful discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and the Fourteenth Amendment to the U.S. Constitution. See, e.g., *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984).

This brief is filed because of the IAFF's interest in ensuring that the right of its members and local unions to intervene in good faith in actions where their statutory and collectively-bargained protections are jeopardized is not chilled by the automatic assessment of attorney's fees and expenses when they do not prevail.

SUMMARY OF ARGUMENT

There is no general obligation for a nonparty to employment discrimination litigation to intervene in order to ensure that a judgment rendered in such litigation will not affect his legal rights. Similarly, there is no federal statute addressing the liability of an intervenor in such an action to other parties for attorneys' fees incurred as a result of the intervention.

Consequently, when a nonparty does intervene, his responsibility to other parties in the litigation should be determined in accordance with standards applicable in federal court litigation generally—that is, Section 1927 of the Judicial Code and Rule 11 of the Federal Rules of Civil Procedure. In the alternative, such intervenors should be considered "functional plaintiffs" for the purpose of evaluating their responsibility for fees or costs under Section 706(k) of Title VII. Either of these treatments will ensure that litigants whose positions the intervenor is opposing will not be subjected to unreasonable increases in the expenses they might undergo to vindicate their positions. At the same time, nonparties will not be deterred in their efforts to pursue their own statutorily protected rights against discrimination.

ARGUMENT

NONPARTIES TO TITLE VII LITIGATION WHO INTERVENE TO PROTECT THEIR OWN RIGHTS AGAINST DISCRIMINATION SHOULD NOT BE ASSESSED ATTORNEYS' FEES IF THEY DO NOT PREVAIL

In federal court litigation generally, "absent statute or enforceable contract, litigants pay their own attorneys' fees." *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 257 (1975). When such litigation is brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, there is statutory authority for

variance from the general rule. Section 706(k) of Title VII provides that in such an action "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs. . . ." 42 U.S.C. § 2000e-5(k). "[U]nder § 706(k) . . . a prevailing *plaintiff* ordinarily is to be awarded attorney's fees in all but special circumstances." *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 417 (1978). In *Christianburg Garment*, this Court held the term "prevailing party" to encompass defendants as well and set the parameters within which a defendant should be allowed an attorney's fee when it is the prevailing party:

> In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.
>
> * * * *
>
> [A] plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.

434 U.S. at 421. 422. The Court applied a less burdensome standard to plaintiffs because (1) Congress chose to vindicate the purposes of Title VII via lawsuits brought by plaintiffs, and (2) in granting fee awards to plaintiffs, federal courts are requiring violators of federal law to foot the bill for vindicating the statute. *Id.* at 418-419. Defendants, on the other hand, needed only to be protected from the bringing of "burdensome litigation having no legal or factual basis." *Id.* at 420. Section 706(k) does not mention intervenors and no consideration was given their status in *Christianburg Garment.*

Under Rule 24 of the Federal Rules of Civil Procedure, an intervenor enters litigation to which he is not a party

> (a) . . . when [he] claims an interest relating to the property or transaction which is the subject of the action and [he] is so situated that the disposition of the action may as a practical matter impair or impede [his] ability to protect that interest. . .
>
> [or]
>
> (b) . . . when [his] claim or defense and the main action have a question of law or fact in common.

In Title VII litigation, the threat that existing parties to a lawsuit may take actions which undermine an existing right or entitlement of employment of an outsider to the litigation usually provides the impetus for the filing of a Rule 24 application to intervene. In many cases, like this one, that right is the product of seniority and/or collective bargaining. See, e.g., *Firefighters Local Union No. 1784 v. Stotts, supra.*

The protection of such employment rights, provided the rights themselves did not stem from an act of discrimination, is itself a legitimate concern under Title VII. This is evident from the protection afforded bona fide seniority systems under Section 703(h) and the prohibition in the last sentence of Section 706(g) on the granting of relief to any individual not subjected to unlawful discrimination. Thus, in situations like this one, where an intervenor has become involved in ongoing litigation simply to ensure that its legitimate rights (or those of the employees it represents) are not trampled by the existing parties, it too is acting in a manner consistent with the purposes of the Act. Should relief be granted a plaintiff which exceeds the lawful parameters of Title VII, then the intervenor could very well be subjected to unlawful discrimination.

In these circumstances, the intervenor should not be cast into the mold of a statutory offender and automatically be subjected to paying the plaintiff's attorney's fees. To do so would be wholly inconsistent with the intent of

Section 706(k)—the intervenor has neither interfered with the vindication of the policy of eradicating discrimination nor impeded the plaintiff's ability to win on the merits against the defendant. Moreover, the intervenor has neither been sued nor found to have violated any law. All it has done is become party to an ongoing suit to protect its own interests under the law.

This result is even more appropriate when one recognizes the emphasis that the Title VII scheme places on voluntary conciliation and settlement. "Cooperation and voluntary compliance were selected as the preferred means for achieving [Title VII's] goals." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Prior to the institution of a lawsuit, a person aggrieved by an act of discrimination *must* file a charge of discrimination. That charge is to be investigated by the Equal Employment Opportunity Commission and pursued through an administrative conciliation process. Only after the administrative process fails to resolve his claim is the charging party permitted to institute a federal court suit.

Section 706(k) neatly fits this scheme as it provides an additional incentive for the charged party to settle. If the charged party pushes the charging party to litigate, it will be liable for the charging party's attorney's fees should it lose.

Section 706 is the authority by which the federal courts make the prevailing plaintiff whole as a result of the defendant's violation of the anti-discrimination provisions of the law, in the first place, and the defendant's unwillingness to settle with the plaintiff through the administrative charge process in the second. Thus, Section 706(k) is the conduit for the plaintiff's reimbursement of the expenses he had to undergo in order to obtain his other relief pursuant to Section 706(g), which relief necessarily flows from the defendant wrongdoer. The fee obligation then is but one element of the overall statutory scheme, a scheme which is premised on the relationship

between discriminator and discriminatee. Congress simply did not contemplate, and consequently did not address, the involvement of innocent third parties in Title VII litigation when it created Section 706(k).

What respondents do here is to imply from silence in the statute an intent by Congress to hold charging parties harmless in the area of fees regardless of the source of the challenge to their position. Their interpretation assumes intervenors are obstructionists *per se*. This construction of the statute goes too far. As this Court noted in *Northwest Airlines v. Transport Workers*, 451 U.S. 77, 94 (1981), when it refused to imply a contribution right into the Title VII scheme, "[a] frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." (quoting *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974)).

Contrary to respondent's protestations, this absence of reference to the intervenor in Section 706(k) does not subject Title VII plaintiffs to the unrestricted mercy of overly litigious outsiders. While we believe that the equitable considerations raised by respondents are more appropriately addressed to Congress,[2] the federal courts are not weaponless to address abuses of the judicial process should Title VII intervenors view a reversal here as a *carte blanche* invitation to challenge every Title VII settlement. Adequate safeguards for protecting employment discrimination plaintiffs already exist within the framework of the Judicial Code.

Section 1927 of the Judicial Code, 28 U.S.C. § 1927, provides for a significant monetary penalty to be borne by any attorney "who so multiplies the proceedings in any case unreasonably and vexatiously." That penalty

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[2] *Northwest Airlines*, 451 U.S. at 98, n.41.

is that he "may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct." [3] Section 1927 has in fact been used to protect Title VII litigants against such objectionable behavior. See, e.g., *Conley v. KFC Corp.*, 622 F.Supp. 767 (D. Ky. 1985); *Rogers v. Kroger Company*, 586 F.Supp. 597 (S.D. Tex. 1984); *Davidson v. Allis-Chalmers Corporation*, 567 F.Supp. 1532 (W.D. Mo. 1983).

Furthermore, Rule 11 of the Federal Rules of Civil Procedure affords additional protection to the Title VII plaintiff. In pertinent part, it provides severe consequences to attorneys and their clients who abuse the judicial process to the detriment of other parties:

> Every pleading, motion and other paper . . . shall be signed . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Like § 1927, Rule 11 has been utilized to address abuses in employment discrimination litigation as well. See, e.g.,

[3] In response to this Court's decision in *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), Congress eliminated the requirement that bad faith be demonstrated in order to recover under Section 1927.

Hudson v. Moore Business Forms, 827 F.2d 450 (9th Cir. 1987) (frivolous and harassing counterclaim); *Worrell v. Uniforms to You & Co.*, 655 F.Supp. 246 (N.D. Cal. 1987). Absent further direction from Congress that Section 706(k) applies to intervenors, who were not parties during the administrative process, we submit that Section 1927 and Rule 11 empower the judiciary with sufficient weaponry to combat the improper tactics of any obstructionist intervenor.

In the alternative, we support the proposition that the only proper application of Section 706(k) to intervenor labor organizations such as petitioner is to consider the organization to be a "functional plaintiff." The union, after all, is not a party charged by the plaintiff with violating the law. Rather, it is acting to ensure that the plaintiff and defendant together do not agree to relief which itself violates the legal rights of the innocent employees whom the union represents. Absent intervention in the case, the union could file its own action challenging the settlement; indeed, so could each of the adversely affected innocent employees. (Significantly, by intervening the union has saved the plaintiff from the need later to defend in a multiplicity of actions which also unduly burden the judicial system.) It simply is folly to suggest that the Act is vindicated by subjecting the intervening union asserting good faith claims to the same standard as a guilty defendant.[4]

[4] The Court was faced with an analogous quandary in *General Building Contractors v. Pennsylvania*, 458 U.S. 375 (1982). There the lower courts had held a trade association and construction industry employers responsible for damages caused by discrimination in a union-administered hiring hall which they were contractually bound to use in obtaining employees, despite the fact that they had not acted with an intent to discriminate. Finding that the remedial powers of the federal court "could be exercised only on the basis of a violation of the law," (*Id.* at 399), the Court found "no support for the imposition of injunctive relief against a party found not to have violated any substantive right of [the plaintiff]." *Id.*

Civil rights litigants, whether they be plaintiff or intervenor, ought not to be discouraged from asserting good faith statutory claims. The involvement of intervenors with legitimate interests in the outcome of litigation will aid the courts and existing parties in reaching a fair, remedial result that takes into account, in a single proceeding, the rights of all concerned. In contrast, the deterrent effect of an affirmance here will frustrate the achievement of this goal and generate the unsettling consequences inherent in multiple court actions. As one commentator has aptly noted:

> Employment discrimination is an example of an area of the law that appears to be in a state of flux. Earlier, the Supreme Court refused to invalidate race-conscious affirmative action plans in employment. *See United Steelworkers v. Weber*, 443 U.S. 1983 (1979). . . Recently, however, the Court has permitted such plans less deference. *See Firefighters Local Union No. 1784 v. Stotts*, 104 S.Ct. 2576 (1987). If whites or nonwhites were consistently unrepresented in employment discrimination cases, the future development of case law would suffer as a result.

Price, "Protecting Defendant-Intervenors from Attorneys' Fee Liability in Civil Rights Cases," 23 Harv. J. on Legis. 579, 587 (1986).

CONCLUSION

The assessment of attorney's fees against an intervenor representing innocent employees and who has not been accused of or found to be a violator of plaintiff's rights is not permitted under Section 706(k). Such an award was not contemplated by Congress in enacting this fee shifting provision of Title VII and is inconsistent with Congressional intent that the party who violated plaintiff's rights be the party obliged to pay for the attorney's fees plaintiff incurs to vindicate those rights.

Until such time as Congress amends Section 706(k), a Title VII plaintiff's right to an award of fees against

good faith intervenors should be measured by the standards of Section 1927 of the Judicial Code and Rule 11, F.R.C.P. These provisions provide adequate safeguards for plaintiffs that they will not be subjected to frivolous challenges by intervenors or unduly delayed in obtaining relief to which they are entitled, while assuring that the opportunity for innocent intervenors to protect their interests is not chilled.

In the alternative, should Section 706(k) be deemed applicable, the role of intervenors as *de facto* plaintiffs should be recognized so that as a condition of intervening to protect their rights they are not automatically subjected to a fee obligation should they lose. Their positions should be tested in the same manner as any Title VII plaintiff who initiates an action to secure his rights.

The decision of the panel majority of the Court of Appeals to the contrary is in error. It should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 88-608 (7)

In The

Supreme Court of the United States

October Term, 1988

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Petitioner,

vs.

ANNE B. ZIPES, et al.,

Respondents.

BRIEF OF AMERICANS UNITED FOR LIFE LEGAL DEFENSE FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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ANNE B. ZIPES, et al.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF OF AMERICANS UNITED
FOR LIFE LEGAL DEFENSE FUND (AUL)
AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

AMERICANS UNITED FOR LIFE LEGAL DEFENSE FUND (AUL) is a not-for-profit, national, public interest law firm. AUL is entirely supported by private charitable contributions and charges no attorneys fees or costs to its clients. AUL has represented a number of intervening defendants in federal litigation. In Harris v. McRae, 448 U.S. 297 (1980), a challenge to the Hyde Amendment, AUL represented Senators James L. Buckley, Jesse A. Helms, and Representative Henry J. Hyde. In Diamond v. Charles, 476 U.S. 54 (1986), a challenge to the Illinois Abortion Act, AUL represented two physicians. And in Bowen v. Kendrick, -- U.S.-- 108 S.Ct. 2562 (1988), AUL represented United Families of America in a challenge to the constitutionality of the Adolescent Family Life Act (AFLA).

Pursuant to NAACP v. Button, 371 U.S. 415 (1963), and In re Primus, 436 U.S. 412 (1978), AUL solicits clients to participate in civil rights litigation, where appropriate, as intervening defendants. The purpose of such activity is twofold: to protect the rights and legal interests of such parties, and to advance AUL's organizational mission of maximizing legal protection for human life. AUL's use of litigation as a means of advocacy is indistinguishable from that of its principal opponents - except that AUL typically is in the position of defending state and federal statutes, while its opponents attack such statutes. Like other public-interest firms, AUL agrees to indemnify the clients that it solicits for all expenses, fees, and costs incurred or assessed in litigation.

AUL thus has a direct monetary interest in the disposition of this case. The same panel of the court of appeals that awarded attorneys' fees against the petitioner also awarded fees in excess of $250,000.00 (including interest and subsequent fee petitions) against AUL's clients, two physicians who had intervened as defendants in a suit challenging the Illinois abortion statute. Charles v. Daley, 846 F.2d 1057 (7th Cir. 1988), pet. for cert. filed, Diamond v. Charles, No. 88-664 (U.S., Oct. 20, 1988). This judgment severely compromises the ability of AUL's clients and potential clients to intervene as defendants in civil rights litigation to defend their legal interests, since they risk incurring huge fee awards if their claims are rejected. Furthermore, because of its standard prac-

tice of indemnifying its solicited clients, AUL must directly bear the burden of satisfying the fees award in Charles and in other cases where fees are assessed.

AUL's interest in the disposition of this litigation is set forth in greater detail in the petition for certiorari filed in Diamond v. Charles, No. 88-664.

SUMMARY OF ARGUMENT

This case is one in a series of erroneous lower court decisions which have assessed attorneys' fees under the federal civil rights statutes against intervening defendants who are free of any liability under the civil rights laws. Such awards violate the principle that "[t]here is no cause of action against a defendant for fees... absent that defendant's liability for relief on the merits." Kentucky v.

Graham, 473 U.S. 159, 170 (1985). Civil rights plaintiffs are only entitled to recover fees from those parties against whom they have "prevailed." This Court has repeatedly emphasized that a party does not "prevail" for the purposes of the fee-shifting statutes unless that party has obtained relief "which affects the behavior of the defendant towards the plaintiff." Hewitt v. Helms, --U.S.--, 107 S.Ct. 2672, 2676 (1987). In cases, such as this one, where the plaintiff has obtained no relief on the merits from the intervening defendant, the fee-shifting statutes provide no basis for an award of fees against the intervening defendant.

By assessing fees against innocent intervening defendants, the court of appeals below has converted the civil rights fee-shifting statutes into indepen-

dent sources of financial liability against parties whose only offense is that they have entered litigation to protect their own legal rights. This is contrary to the purpose of the fee-shifting statutes, which were not enacted to create new substantive liability, but only to provide an incentive to sue for those whose rights have been violated, and to punish those guilty of such violations. Awards against intervenors who are innocent of such violations cannot be defended on the theory that such intervenors add to the expense of litigation. The "work theory" adopted by the court of appeals has been implicitly rejected by this Court in several cases. Moreover, since the court of appeals' "work theory" is directed exclusively at intervening defendants, and not at their plaintiff counter-

parts, it is highly inequitable. Finally, the "work theory" can be used to assess fees against an amicus curiae, or other non-parties to the litigation.

Assessing fee awards against intervenors will inevitably chill meritorious petitions for intervention in civil rights cases. Intervention has a salutary effect on civil rights litigation, bringing the opportunity for a fuller range of arguments on the proper application of the civil rights statutes. Without the opportunity for intervention, parties with competing claims may never be effectively heard.

Assessing fees against non-liable intervening defendants is also not necessary to protect the legitimate interests of civil rights plaintiffs who obtain relief from other defendants. Plaintiffs

will most often be able to obtain a fully compensatory fee from the defendants who have violated their rights. Moreover, the strict requirements of Rule 24 of the Federal Rules of Civil Procedure limit intervention to those parties with genuine legal interests in the dispute. In this case, the plaintiff has recovered very substantial fees from those responsible for the violation of Title VII. The purposes of the fee-shifting provision of Title VII are not served by imposing further liability upon those innocent of such violation.

In related cases, particularly those involving organizations which use litigation as a means of political expression and advocacy, the imposition of attorneys' fees threatens to chill their First Amendment rights. Since such awards are not

tied to a violation of civil rights, but to the position which the intervenor has taken in court, they act as a sanction upon speech, not upon conduct. Such awards also restrict the ability of counsel to locate and recruit potential litigants for public-interest cases.

Because such awards fall exclusively upon intervening defendants whose claims are rejected, and not upon plaintiffs whose claims are rejected, they also discriminate on the basis of viewpoint. Also, by compelling organizations which intervene as defendants to subsidize the attorneys' fees of their opponents, the courts are effectively forcing such organizations to contribute for the propagation of opinions of which they disapprove. Since the risk of such "forced speech" falls unequally upon intervening

defendants and plaintiffs, it cannot withstand constitutional scrutiny.

In order to avoid these constitutional problems, and to end the confusion over the liability of intervening defendants for attorneys' fees in civil rights cases, this Court should reaffirm the principle that liability for attorneys' fees is tied to liability on the merits, and that in the absence of liability on the merits against a defendant, no liability for fees can be assessed against that defendant. Any other rule will generate further wasteful litigation over the proper allocation of attorneys' fees. The rule proposed is the only one consistent with the text, history, and purpose of the civil rights fee-shifting statutes, and with the standards announced by this Court in prior cases.

ARGUMENT

I. **INTERVENING DEFENDANTS SHOULD NOT BE HELD LIABLE UNDER THE CIVIL RIGHTS FEE SHIFTING STATUTES UNLESS THEY ARE LIABLE FOR RELIEF OBTAINED BY THE PLAINTIFFS ON THE MERITS**

This case presents an opportunity to rectify the confusion that has reigned in the lower federal courts for over twenty years concerning the assessment of attorney's fees against intervening defendants who are free from liability on the merits of the underlying civil rights statutes.[1/] See generally, Goldberger, First Amendment Constraints on the Award of Attorneys' Fees Against Civil Rights Defendant-

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1/ This Brief will refer to the following "substantially identical" fee-shifting provisions as the "civil rights fee-shifting statutes:" §706(k) of Title VII, 42 U.S.C. §2000e-5(k); §204(b) of Title II, 42 U.S.C. §2000a-3(b); 42 U.S.C. §1988. See Christianburg Garment Co. v. EEOC, 434 U.S. 412, 416 (1978).

Intervenors: The Dilemma of the Innocent Volunteer, 47 Ohio St. L.J. 603 (1986).

Many courts have held that the federal civil rights statutes do not justify punitive attorneys' fees awards against otherwise innocent parties who have intervened in litigation to protect their own legal interests. Annunziato v. The Gan, Inc., 744 F.2d 244 (2nd Cir. 1984); Wolfe v. Stumbo, No. C-80-0285 (W.D. Ky., Dec. 15, 1983); Planned Parenthood of Memphis v. Alexander, No. 78-2310 (W.D. Tenn., Dec. 23, 1981); Kirkland v. New York State Dept. of Correctional Services, 524 F. Supp 1214 (S.D.N.Y. 1981).

Other courts, while acknowledging the innocence of such parties under the civil rights statutes, have nevertheless awarded substantial attorneys' fees against them, proceeding under a theory that all "defen-

dants" must bear the burden of applicable fee-shifting statutes. See e.g., Charles v. Daley, 846 F.2d 1057 (7th Cir. 1988) pet. for cert. filed sub. nom. Diamond v. Charles, No. 88-664 (U.S., Oct. 20, 1988); Akron Center for Reproductive Health v. City of Akron, 604 F. Supp 1268 (N.D. Ohio 1985); Vulcan Society of Westchester County v. Fire Department, 533 F. Supp 1054 (S.D. N. Y. 1982). Some courts have gone so far as to award fees against parties whose Rule 24 petitions to intervene were denied. See, e.g., Moten v. Bricklayers, Masons, & Plasterers Int'l Union, 543 F.2d 224 (D.C. Cir. 1976); Robideau v. O'Brien, 525 F. Supp 878 (E.D. Mich. 1981); Thompson v. Sawyer, 586 F. Supp 635 (D.D.C. 1984).

In such cases, the salutary motive of rewarding successful civil rights advocacy

is purchased at extreme cost to those private groups and individuals who, like the plaintiffs, have sought to engage in litigation to protect their legal rights. Such an approach is inconsistent with the plain text and legislative history of the fee-shifting statutes, and compromises the rights of intervention secured by F.R. Civ. P. 24. Furthermore, it creates an unfair double-standard in civil rights cases. Win or lose, private parties who litigate as plaintiffs bear little or no risk of being assessed fees; and if they win, such parties will have their fees paid for. On the other hand, private parties who litigate as intervening defendants must not only pay their own attorneys, but must also pay a successful plaintiff's attorneys - even though they have committed no violation of the civil rights laws.

The principles enunciated by this Court in civil rights attorneys' fees cases state that such awards are improper. These principles must be reaffirmed, and the erroneous doctrines of the court of appeals reversed.

A. Awards of Attorneys' Fees Against Innocent Intervening Defendants Are Impermissible under the Federal Civil Rights Statutes

1. The petitioner accurately notes that this Court has never addressed the specific issue of applying the civil rights fee-shifting statutes to "parties who are neither the victims nor the perpetrators of the alleged discrimination, but who intervene to be heard because the resolution of the litigation will affect their rights." Petition for Certiorari at 3. However, this Court, based upon the

text, statutory history, and purpose of the relevant statutes, has repeatedly stated general principles of fees liability that are dispositive. "There is no cause of action against a defendant for fees...absent that defendant's liability for relief on the merits." Kentucky v. Graham, 473 U.S. 159, 170 (1985). See also, Hewitt v. Helms, --U.S.-- 107 S.Ct. 2672 (1987) (Even where a court has stated that plaintiff's rights were violated by a defendant fees may not be assessed against that defendant if no merits relief was obtained from him.); Hanrahan v. Hampton, 446 U.S. 754, 756 (1980) (A party is not a "prevailing" party "in the sense intended by 42 U.S.C. § 1988" unless it has obtained relief on the merits of its claim.); Christianburg Garment Co. v. EEOC, 434 U.S. 412, 418 (1978) ("[W]hen a

district court awards counsel fees [under the Civil Rights Act of 1964] to a prevailing plaintiff, it is awarding them against a violator of federal law.")

Every time that a court awards attorneys' fees against a non-liable intervening defendant, it violates the holding of Graham that the fee statutes do not authorize a fee award against any defendant who has not been prevailed against on the merits of the plaintiff's claim. 473 U.S. at 165. In such cases, the plaintiff has obtained no relief from the intervening defendant. Rather, the plaintiff has obtained, at best, a decree that the intervening defendant's legal claims do not preclude the plaintiff's own claims for relief. However, as this Court noted in Hewitt v. Helms, "[i]n all civil litigation, the judicial decree is not the end

but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces - the payment of damages, or some specific performance, or the termination of some conduct. ... The real value of the judicial pronouncement - what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion - is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff." -- U.S. at --, 107 S. Ct. at 2676 (emphasis in original). In Rhodes v. Stewart, -- U.S.--, 109 S. Ct. 202 (1988) (per curiam), this Court again noted that in the absence of relief on the merits, "a party cannot meet the threshold requirement of §1988 that he prevail, and in consequence he is not entitled to an award of attorney's fees." 109 S. Ct. at 204.

2. The applicable standard for this case, and others like it, is that a plaintiff is not entitled to fees from an intervening defendant unless the plaintiff has obtained from that party some relief on the merits of the underlying litigation. This is the only rule consistent with the text, legislative history, and purpose of the fee-shifting statutes. For example, §1988 was enacted: (1) so that plaintiffs could vindicate federal constitutional and statutory rights, and (2) so that "those who violate the Nation's fundamental laws" may not "proceed with impunity." S. Rep. No. 1011, 94th Cong. 2nd Sess. 2 (1976), reprinted in 1976 U.S. Code Cong. & Admin. News 5908, 5910. Some courts have effectively taken the position that the first of these objectives is all-important, and may be met even at the

expense of sanctioning parties who have not violated any law. See, e.g., Charles v. Daley, 846 F.2d at 1063. However, this ignores the express intent of Congress that §1988, and related provisions, did not enact any change in the substantive liability provisions of the underlying statutes. 122 Cong. Rec. at 35122 (statement of Rep. Drinan). According to the view adopted by the Seventh Circuit, §1988 and §706(k) are converted, contrary to legislative intent, into independent sources of financial liability against defendants who are guilty of no wrongdoing, but are merely "guilty" of asserting legal theories that are opposed to those of a successful plaintiff.

3. The Seventh Circuit also justified its fee award against the union, and against the intervenors in Charles, by

citing the "added work" caused by the presence of these parties in the litigation. While this argument has facial appeal, it cannot be squared with this Court's decisions, nor with the text of the civil rights statutes. As demonstrated in Hanrahan v. Hampton, 446 U.S. 754 (1980), Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980), and Hewitt v. Helms, 107 S.Ct. 2672 (1987), the fact that a civil rights plaintiff has expended effort to defeat the legal arguments posed by a defendant does not entitle the plaintiff to fees from that defendant unless merits relief has also been obtained from that defendant.

In Hanrahan, this Court determined that the work expended by plaintiffs' counsel in defeating their opponents on procedural issues was irrelevant unless

relief had been obtained on the merits. In the absence of such relief, no fees could be awarded. 446 U.S. at 757. In Helms, the plaintiff had obtained merits relief, but because the relief was rendered moot, plaintiffs' counsel received no fee award to compensate for its substantial work in defeating the defendant's legal arguments. 107 S.Ct. at 2676. If the Seventh Circuit's "work theory" were valid, the Helms plaintiffs should have recovered for the work caused by the defendant's opposition to their claims. However, this Court rejected such an approach, causing Judge Manion, in dissent, to remark:

> If the plaintiff in Helms was denied attorneys' fees despite his establishing as a 'private attorney general' that the defendants violated his constitu-

> tional rights, it is difficult to see how plaintiffs in the present case can obtain fees against intervenors who did not violate any of the plaintiffs' rights and were not liable on the merits.

Charles v. Daley, 846 F.2d at 1078.

In Consumers Union, the defendant state court was also found liable for failing to amend the State Bar Code to cure a constitutional defect. The court's defense of its actions had caused work for the plaintiff's counsel, and fees were awarded to compensate for that work. Nevertheless, because the state court could not be liable on the merits for actions taken, or not taken, in its legislative capacity, this Court vacated the district court's fee award. Again, if the "work theory" were valid, plaintiffs should have been entitled to recover their

fees. However, this Court determined that the pivotal issue in determining fees liability is not whether a plaintiff has been forced to expend effort to defeat a defendant's arguments, but whether that defendant is responsible for relief obtained on the merits. 446 U.S. at 734, 739.

Another problem with the "work theory" is that it may logically be applied to those who are not even parties in civil rights litigation. For example, in Moten, 543 F.2d 224, Robideau, 525 F.Supp. 878, and Thompson, 586 F.Supp. 635, fees were awarded against parties who were unsuccessful in their petitions to intervene. Thus, by merely asserting that one has an interest in the outcome of litigation, a party is exposed to substantial, and chilling, fee awards. AUL

currently represents a client which unsuccessfully petitioned to intervene in a civil rights case, and now faces a claim for attorneys' fees exceeding $33,000. Herbst v. Daley, No. 84 C 5602 (N.D. Ill; fees petition filed March 14, 1986). See also, Thompson v. Sawyer (lodestar fee of $37,245 awarded against unsuccessful applicant for intervention).

Under the "work theory," fees may even be awarded against an amicus curiae. There is nothing in the text of the fee-shifting statutes to distinguish between intervening defendants and amicus, and either form of participation may cause extra work for a prevailing plaintiff. See Comment, Protecting Defendant-Intervenors from Attorneys' Fee Liability in Civil Rights Cases, 23 Harv. J. Legis. 579, 588 (1986). However, Graham clearly

states why fee awards against non-liable intervenors and amicus are equally invalid: "That a plaintiff has prevailed against one party does not entitle him to fees from another party, let alone a non-party." 473 U.S. at 168.

Finally, the "work theory" is inappropriate because it results in the imposition of fees against innocent private parties whose only offense is to seek access to the courts to defend their legal interests. In practice, the work theory discriminates on the basis of viewpoint: the only parties who are penalized solely for causing "work" are those who intervene on behalf of defendants in civil rights cases. Those who intervene on behalf of plaintiffs face no such risk. In order to avoid such constitutional problems, the civil rights fee-shifting statutes should

be construed so that fee awards are predicated upon a party's liability on the merits, and not his advocacy of legal interests that are sufficient to warrant intervention.

B. Awarding Fees Against Non-Liable Intervening Defendants Is an Inappropriate Sanction Against Intervention in Civil Rights Litigation, and Is Not Necessary to Protect the Interests of Civil Rights Plaintiffs

Although fee-shifting is by now commonplace in federal civil rights litigation, it remains an exception to the American Rule. Thus, each application of fee-shifting to a new set of facts must be scrutinized to determine first, if the statute "expressly" provides for fee-shifting in the new circumstance, Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. 240, 269 (1975), and second, if

the purposes set forth in that statute would be advanced, or frustrated, by the proposed fee-shifting. None of the civil rights fee-shifting statutes provide, expressly or otherwise, for the award of fees against non-liable intervening defendants. Moreover, the underlying purposes of such statutes is frustrated by awards which discourage litigation by private individuals and entities who, while innocent of any violation of the civil rights laws, have legal interests which will be affected by relief granted the plaintiffs under such laws.

1. Fee awards against defendant intervenors will inevitably chill such intervention. Parties who contemplate intervention will be deterred by the prospect of paying huge fee awards if they lose, and they will have no corresponding

expectation of recovering fees should they prevail. See, Christianburg Garment Co. v. EEOC, 434 U.S. 412, 420-421 (1978) (fees may be awarded to prevailing defendants only if plaintiff's claims are "unreasonable, frivolous, meritless, or vexatious"). Some public-interest litigants may balance their risk by initiating or intervening in civil rights litigation as plaintiffs. However, for those who must litigate as intervening defendants, or not at all, there is no way of avoiding this risk except to refrain entirely from litigation, or to intervene only when their likelihood of success is certain. Realistically, when faced with having to pay their own lawyers, as well as their opponents', such parties will choose not to litigate.

The cost of such abstention will be to remove an important element in Title VII and §1983 litigation: the advocacy of those private parties who may be harmed by unwarranted expansion of these laws or by relief granted to particular plaintiffs. See, e.g., Idaho v. Freeman, 625 F.2d 887 (9th Cir. 1980) (intervention by NOW to defend notification procedures for Equal Rights Amendment); Washington State Bldg. and Construction Trades Council v. Spellman, 684 F.2d 627 (9th Cir. 1982) (intervention by environmental organization to defend state statute); Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983) (intervention by Audubon Society to defend federal environmental regulations). The named defendants in such lawsuits may be ill-equipped, or even estopped, from making some of the argu-

ments which potential intervenors could present. See, e.g., Sagebrush Rebellion v. Watt, supra. Where appropriate, intervention may also deflate the myopic assumption that the civil rights statutes are a one-way street to relief for aggrieved plaintiffs. Intervenors may act as "functional plaintiffs," seeking to counter a plaintiffs' claim with their own contentions under the civil rights laws, See, Reeves v. Harrell, 791 F.2d 1481 (11th Cir. 1986), cert. denied, 479 U.S. 1033 (1987), or they may establish the harmful impact of the plaintiff's theories upon equally fundamental rights. See, Akron Center for Reproductive Health v. Akron, 604 F.Supp. 1268 (N.D. Ohio 1985) (parents intervened to support parental notification provision of abortion ordinance).

Intervention thus has the salutary effect of bringing to the court the opportunity for a fuller range of arguments on proper application of the civil rights statutes. This is true whether the countervailing interest is that of union members protecting their rights of seniority, or of physicians protecting the lives of their potential patients. While it is the purpose of §1988 and §706(k) to encourage vindication of civil rights, it was not the intent of Congress to do so at the expense of full, vigorous, and contested adjudication of claims brought under these statutes. Yet, by imposing an uneven risk of fee-shifting against private intervening defendants for engaging in such advocacy, the decisions of the Seventh Circuit have had precisely this effect.

2. The consequence of such awards is not merely a diminished range and quality of advocacy in civil rights cases; it is the virtual elimination in such cases of a potential litigant's rights under Rule 24 of the Federal Rules of Civil Procedure. Unless such parties have independent standing to initiate litigation under the civil rights laws, they have no means other than intervention to protect their legal interests. Yet, despite their innocence from substantive liability, such parties can only file a Rule 24 petition at the peril of being assessed their opponents' fees. Indeed, such parties can be penalized for merely asserting a right under Rule 24. Moten, 543 F.2d 224; Robideau, 525 F.Supp. 878; Thompson, 586 F.Supp. 635. The Seventh Circuit, in Charles, supra, candidly

admitted that the prospect of attorneys' fees will inform putative intervenors to "think twice before engaging in battle." 846 F.2d at 1075. Such a blatant intrusion upon the rights afforded under Rule 24 cannot be defended on grounds that intervention is "voluntary and self-initiated." 846 F.2d at 1067. An intervenor's petition under Rule 24 to defend his legal interests is no more "voluntary" or "self-initiated" than the plaintiff's very filing of the lawsuit. Yet, the plaintiff faces no parallel risk of being assessed attorneys' fees if his legal theories do not prevail. Since the plaintiff and the intervenor are equally innocent of any civil rights violation, the effect is not to encourage the filing of civil rights complaints, but to punish the filing of equally meritorious intervention petitions.

3. Awarding fees against non-liable intervening defendants is not necessary to protect the legitimate interests of plaintiffs who prevail in civil rights litigation. Most often, compensatory fees will be assessed against the parties liable for relief on the merits of the plaintiff's claims. Since these parties alone have the capacity to grant the relief sought by the plaintiff, they should be accountable for the work that is required to obtain such relief.2/ Even if such parties can-

2/ In enacting §1988, Congress assumed that fees would be assessed against the State. "In such cases, it is intended that the attorneys' fees... will be collected directly from the official, in his official capacity, from funds of his agency or under his control or from the State or local government." S.Rep. No. 1011, 94th Cong. 2nd Sess. 6, reprinted in 1976 U.S. Code, Cong. & Admin. News 5908, 5913. "The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff..." H.R. Rep. No. 1558, 94th Cong., 2d Sess. at 7.

not be justly held responsible for all of a plaintiff's fees, it does not follow that the plaintiff is entitled to collect the balance from an intervenor. Section 706(k), §1988, and related provisions do not create "a relief fund for lawyers," and they "[do] not create fee liability where merits liability is non-existent." Graham, 473 U.S. at 168 (citations omitted). Moreover, plaintiffs are not automatically entitled to fees by virtue of obtaining a judgment or a favorable settlement. See, e.g., Kentucky v. Graham; Jeff D. v. Evans, 475 U.S. 717 (1986). The plaintiff (or plaintiff's counsel) who must bear the cost of litigating against claims raised by an intervenor, but is compensated for the remainder of his case, is far better off than most litigants, including the successful plaintiffs in Jeff D. and Graham.

It is also unrealistic to argue that screening non-liable intervenors from fee awards will unduly burden civil rights plaintiffs. Rule 24 of the Federal Rules of Civil Procedure requires all intervenors to have a protectable legal interest as the basis for their intervention; if such interest is lacking, then the court may deny intervention. Goldberger, supra, 47 Ohio St. L.J. at 614; see Keith v. Daley, 764 F.2d 1265 (7th Cir.), cert. denied sub. nom. Illinois Pro-Life Coalition, Inc., III v. Keith, 106 S.Ct. 383 (1985). However, where such an interest is present, its holder should not be compelled to stay on the sidelines at the risk of incurring a fees award. In this situation, over-sensitivity to the plaintiff's interest in recovering a compensatory fee is permitted to squelch another

party's very right to have his day in court. Furthermore, in light of this Court's decision in Diamond v. Charles, 476 U.S. 54 (1986), denying standing on appeal to private intervenors when the state attorney general fails to appeal, the capacity of such intervenors to "prolong" litigation in the absence of the named defendants is severely curtailed.

Finally, although this question is not before the Court, an intervenor might be liable for fees if his claims are frivolous or vexatious. Christianburg Garment Co., 434 U.S. at 420-421. Such conduct is also sanctionable under Rule 11 and Rule 37 of the Federal Rules of Civil Procedure. Moreover, if it becomes apparent that an intervenor no longer has a cognizable legal interest in a case, a plaintiff may move at any time to dismiss the intervenor from the litigation.

In short, a civil rights plaintiff is not entitled to litigate without opposition, nor is he entitled to his fees in all circumstances. The risks imposed by allowing innocent intervenors to present their claims without fear of being taxed for plaintiff's fees are no different in kind or degree from the risks already borne by civil rights plaintiffs when they initiate litigation. These risks are acceptable, controllable, and necessary to preserve access to the courts for those with legal interests contrary to those of the plaintiff.

C. Innocent Intervening Defendants in Civil Rights Cases Must Be Uniformly Protected From Fees Liability

The best route for disposing of this case is to follow Kentucky v. Graham, and hold that, in the case of intervening

defendants, as in the case of governmental defendants, "liability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, [§706(k)] does not authorize a fee award against that defendant." 473 U.S. at 165. The IFFA's nonliability on the merits is the most salient, undisputed, and justifiable criterion for exonerating it from fees liability. The other arguments relied upon by the IFFA, while meritorious, are complementary to the central issue at stake in this case: the erroneous extension of attorneys' fees liability to parties who are admittedly free from taint on the underlying statute. See, Charles, 846 F.2d at 1070 ("the intervenors were found to have themselves violated none of the

plaintiffs' constitutional rights."). Moreover, if the IFFA had been liable for relief on the merits, its remaining arguments would only serve to mitigate the extent of its liability for attorneys' fees. The union's status as an "innocent" intervenor is thus the sine qua non of its petition to this Court, and it is the proper focus of this Court's analysis.

By emphasizing the link between merits liability and fees liability that is at the heart of the civil rights fee-shifting statutes, this Court will restore consistency and predictability to an area of law sorely in need of these qualities. This Court has wisely observed that a "request for attorney's fees should not result in a second major litigation." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). However, current law on the issue

of intervenors' fees liability virtually guarantees that such major litigation will occur. The circuit and district courts are split not only over the liability of such parties for fees, but also over the appropriate amount of fees that should be awarded. For example, the intervening parties in Charles v. Daley were assessed over two-thirds of the total fees bill in that case; the intervenors in the Akron case, whose role in the litigation was virtually identical to that of the Charles intervenors, were assessed only five percent of the total bill. Akron, 604 F. Supp. at 1294. Furthermore, there are no clear guidelines for the apportionment of such fees. The attempt to assess fees according to the work caused by a particular party is inherently subjective, and may be influenced by the prevailing

party's motivation to exact a financial penalty from an ideological or political rival. Under these circumstances, intervenors against whom substantial fees are sought will have every incentive to contest such awards.

This state of affairs is the natural and predictable consequence of improperly severing the link between fees and merits liability under the civil rights statutes. To restore order, this Court should declare the following standard applicable to intervening defendants in all civil rights cases: attorneys' fees may be awarded against such parties only if the intervening defendant is liable for some portion of the relief obtained by the plaintiffs on the merits.

II. IMPOSITION OF ATTORNEYS' FEES AGAINST INTERVENING DEFENDANTS IN PUBLIC INTEREST LITIGATION VIOLATES THE FIRST AMENDMENT RIGHTS OF THOSE PARTIES TO PARTICIPATE IN LITIGATION AS A MEANS OF POLITICAL EXPRESSION

This Court has long held to the policy that an Act of Congress "ought not be construed to violate the Constitution if any other construction remains available." NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979). In this case, the construction of §706(k) and §1988 adopted by the Seventh Circuit threatens a severe violation of the right to litigate as a means of political expression. NAACP v. Button, 371 U.S. 415 (1963); In re Primus, 436 U.S. 412 (1978). Where, as here, the potentially unconstitutional construction is so ill-founded, there is all the more reason to

avoid it. If, however, that construction cannot be avoided, this Court should decide the important question of whether awards such as this violate the right secured in Button and Primus.

For several reasons, fee awards against non-liable intervening defendants violate the rights of such parties to litigate as a means of political expression. First, such awards bear no relation to any violation of civil rights by the intervenor, but are made simply because the intervenor has allied himself with a losing cause. Thus, the fees serve as a sanction not against conduct, but against the content of the intervenor's speech. Second, the prospect of fees liability chills the process of soliciting clients that is specifically protected by Button. It is difficult to imagine, to

use the language of the Seventh Circuit, a more "specific and admittedly severe restriction[] on the ability of counsel to locate and recruit potential litigants." Charles v. Daley, 846 F.2d at 1074. See Goldberger, First Amendment Constraints on the Award of Attorneys' Fees Against Civil Rights Defendant-Intervenors: The Dilemma of the Innocent Volunteer, 47 Ohio St. L.J. 603 (1986).

Third, fee awards against public-interest intervenors discriminate on the basis of viewpoint. In establishing the principle that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment," In re Primus, 436 U.S. 412, 426 (1978), this Court emphasized that this right must be equally extended to all public interest

litigants, regardless of how well or poorly their legal arguments fare in court:

> That the petitioner happens to be engaged in activities of expression and association on behalf of the rights of Negro children to equal opportunity is constitutionally irrelevant to the ground of our decision. The course of our decisions in the First Amendment area makes plain that its protection would apply as fully to those who would arouse our society against the objectives of the petitioner. For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered.

Button, 371 U.S. at 444-445 (Emphasis supplied). Awarding attorneys' fees against innocent private parties who act to defend governmental action effectively penalizes the speech of such parties on the basis of content. Between parties with competing legal claims, neither of which has violated any civil rights laws, all of the risk of attorneys' fees is borne by those who happen to be in the posture of defense, while none of the risk falls upon those who find themselves as plaintiffs.

Fourth, in cases where the intervenor and plaintiff are litigating as a means of political expression, see, e.g., Charles v. Daley, the award of fees against the intervenor has the effect of forcing the intervenor to subsidize the activity of its political and ideological opponents.

This Court, following Madison and Jefferson, has termed such forced contributions to be "tyrannical." Abood v. Detroit Board of Education, 431 U.S. 209, 234-35, n.31 (1977). "Whatever the amount, the quality of respondents' interest in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear." Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, (1986). In deciding whether to exercise rights under Button, a potential intervenor should not have to weigh the prospect of being forced to contribute for the "propagation of opinions which he disbelieves." Abood, 431 U.S. at 235, n.31.

Nor should an advocacy organization involved in intervention, such as AUL, the ACLU, the Audubon Society, the Sierra

Club, or the National Organization of Women, be forced to use membership contributions to underwrite the very forces which they are organized to oppose. What member of, or contributor to, such organizations would want his philanthropy used to benefit the organization's opponents? Not only is this coerced speech of the most offensive type, it also threatens to dry up contributions to those organizations saddled with fee awards by their ideological opponents. Fee-shifting, therefore, can become a form of blackmail by which organizations litigating as plaintiffs threaten financial ruin to those who dare to oppose them by intervening as defendants.

In rejecting these arguments, the Seventh Circuit in Charles stated that an intervenor has no constitutional protec-

tion from the "inherent and statutorily imposed financial consequences" of his litigation activity. 846 F.2d at 1074. However, the question cannot be so simply disposed of, for intervenors are being asked to bear a burden that is neither borne by those who initiate civil rights cases, nor tied to any violation of law. The Seventh Circuit stubbornly refused to recognize that the imposition of attorneys' fees, unlike the shifting of costs, is an extraordinary remedy, and clearly acts as a sanction. In the case of the intervenors in Charles, what is being sanctioned is the exercise of their rights under Button. The punitive character of such fee awards cannot be excused by stating that they are a necessary incentive to civil rights plaintiffs Charles, 846 F.2d at 1074-1075.

> The First Amendment would... be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil.

United Mine Workers of America, District 12 v. Illinois State Bar Ass'n., 389 U.S. 217, 222 (1967). Contrary to the Seventh Circuit's position, therefore, a party cannot be forced to "think twice," 846 F.2d at 1075, before exercising his rights under Button.

In Catholic Bishop of Chicago, this Court held that before determining whether a particular construction of an Act of Congress was unconstitutional, it must first identify whether that construction is based upon "the affirmative intention of the Congress clearly expressed." 440 U.S. at 500 (citations omitted). Congress expressed no affirmative intention that §706(k) and §1988 was to permit the award of fees against non-liable defendants; Graham holds that the intention of Congress was precisely the opposite. This Court should accordingly follow its own "prudential policy," 440 U.S. at 501, and decline to construe §706(k) and §1988 in such a manner that could infringe upon the constitutionally protected interests of those who intervene in civil rights cases as a means of political expression.

CONCLUSION

The judgment of the court of appeals should be reversed for the reason that no intervening defendant can be liable to fees under §706(k) and related fee-shifting provisions unless that defendant is liable for relief on the merits.

Respectfully submitted,

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BRIEF

No. 88-608 (9)

In The Supreme Court of the United States
October Term, 1988

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Petitioner,

v.

ANNE B. ZIPES, et al.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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INTEREST OF AMICI[1]

The American Civil Liberties Union ("ACLU") is a not-for-profit, non-partisan organization that was formed for the purpose of preserving the constitutional protections embodied in the Bill of Rights and of protecting other civil liberties. The American Civil Liberties Union of Illinois ("ACLU of Illinois") is a state affiliate of the ACLU.

The attorney's fee provisions of this country's civil rights acts including § 42 U.S.C. § 2000e-5(k) ("§ 706(k)") and 42 U.S.C. § 1988 ("§ 1988"), were enacted by Congress to ensure effective access to the judicial process for persons with civil rights grievances.

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1 Letters of consent to the filing of this brief have been lodged with the Clerk pursuant to Supreme Court Rule 36.2.

These provisions thus make it possible for persons with meritorious civil rights claims, who would otherwise be unable to afford counsel, to assert their rights in a court of law. The fee eligibility of prevailing civil rights plaintiffs has enabled _amici_ to help many clients vindicate their constitutional rights.

To effectuate Congress' purpose that prevailing civil rights claimants be made whole, it is imperative that civil rights plaintiffs recover all reasonable attorney's fees that were incurred in the course of civil rights litigation. In many cases, substantial effort and fees are expended against intervening defendants who interpose themselves in the lawsuit and seek to deny plaintiffs recovery on their civil rights claims. More specifically, the ACLU has represented plaintiffs in cases in which intervening defendants have erected

barriers to the vindication of plaintiffs' rights and in so doing, have substantially prolonged the litigation at great expense to plaintiffs. _E.g._, _Charles v. Daley_, 846 F. 2d 1057 (7th Cir. 1988) (fees awarded plaintiffs represented by ACLU of Illinois and assessed against intervenors), _petition for certiorari filed_, _Diamond v. Charles_, No. 88-664, 57 U.S.L.W. 3314 (Oct. 20, 1988).

The ACLU opposes any construction of the civil rights attorney's fee provisions which would create a _per se_ prohibition barring a district court, in the reasoned exercise of its discretion, from awarding prevailing civil rights plaintiffs reasonable fees for their efforts litigating against an intervening defendant.

SUMMARY OF THE CASE AND STATEMENT OF THE ARGUMENT

Congress deliberately rejected the "American rule," which requires each person to pay his or her own attorney's fees, when it enacted the attorney's fee provisions in § 706(k) and § 1988.2 Under these provisions and others, a civil rights plaintiff who prevails is entitled to recover attorney's fees from the losing defendant. By shifting the obligation for plaintiff's fees, Congress hoped to encourage individuals injured by

2 The fee shifting provisions in several of the federal civil rights laws, including § 706(k) of Title VII, § 1988, and § 204 of Title II (42 U.S.C. § 2000a-3(b)) are substantially identical. This Court consistently has ruled that related attorney's fee statutes and case law should be consulted when fees are awarded prevailing civil rights plaintiffs. See e.g., Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983); New York Gaslight Club, Inc. v. Carey, 447 U.S 54, 70 n.9 (1980). When appropriate, amici will rely on pertinent authority under 1988 and other civil rights fee-shifting statutes.

discrimination or other civil rights violations to seek judicial relief. Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968); see also Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, Civil Rights Attorney's Fees Awards Act of 1976 -- Source Book: Legis. History, Texts, and Other Documents, 94th Cong., 2d Sess. (hereafter cited as "Source Book").

In the quarter century since the 1964 Civil Rights Act and the first civil rights attorney's fee provision were enacted, this Court consistently has given effect to Congress' purpose of encouraging private enforcement of the nation's civil rights laws. The Court has done so by construing the fee provisions to ensure that each civil rights plaintiff who prevails ordinarily recovers attorney's fees unless "'special circumstances would render such an award

unjust.'" Hensley, 461 U.S. at 429. See also Texas Teachers Ass'n v. Garland School Dist., No. 87-1759, slip op. at 9 (Mar. 28, 1989) ("[i]f the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit,' the plaintiff has crossed the threshold to a fee award of some kind")(citation omitted).

The case at bar presents an issue not uncommon in employment discrimination and civil rights cases. The civil rights plaintiff wins a judgment not only against the named defendant but also against an intervening defendant who voluntarily joined the litigation, often to litigate against plaintiff and to oppose plaintiff's recovery for violation of the very rights Congress sought to protect. To make whole the prevailing plaintiff, the district court awards

plaintiff a reasonable attorney's fee and, when appropriate, allocates fee responsibility between the defendant and intervening defendant.

In many cases, the recovery of fees from an intervening defendant is necessary to achieve the Congressional goal of private enforcement of the civil rights acts. The rules proposed by the petitioner International Federation of Flight Attendants and its amici, particularly the Solicitor General of the United States and the Americans United for Life Legal Defense Fund, would in practical effect, deprive federal district courts of any authority to assess fees against an intervening defendant under the fee shifting provisions of the civil rights laws.3

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3 The International Federation of Flight Attendants is referred to hereafter as "IFFA", with reference to its brief appearing as "IFFA Br. at __. References to the Brief Amicus Curiae filed by the

The Court should reject such draconian restrictions on the authority of the district courts to provide remedies under the civil rights acts.

1. Construing the civil rights attorney's fee provisions to bar prevailing plaintiffs from receiving any fees from intervening defendants absent a showing of frivolous litigation conduct (S.G. Br. at 22-23), or from all intervening defendants who have allied themselves with violators of federal law but who may not themselves have committed an independent violation (IFFA Br. at 20-27, AUL Br. at 16-28), disregards the specific text of the relevant attorney's fee, statutes, which direct that "the

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Solicitor General in support of IFFA appear as "S.G. Br. at __." The Americans United For Life Legal Defense Fund is referred to as "AUL," with references to its brief _amicus curiae_ on behalf of IFFA appearing as "AUL Br. at __."

district court, in its discretion, . . . may allow the prevailing party . . . a reasonable attorney's fee, as part of the costs . . . ." 42 U.S.C. § 2000e-5(k). _See also_ 42 U.S.C. § 1988.

2. The limiting rules proposed by IFFA and its _amici_ also would conflict with the legislative history and would defeat Congress' express command that prevailing plaintiffs be made whole by an award of attorney's fees.

3. Lower federal courts which have been presented with the issue of intervening defendant's fee liability have, without exception, refused to adopt the parsimonious construction of the civil rights attorney's fee provisions urged by IFFA. Although fees have not been assessed against intervening defendants in every case in which they were sought, the lower federal courts have found that Congress intended to vest

the district courts with adequate discretion to allow fees against intervenors under appropriate circumstances. Preserving the discretion of the district court, consistent with the statute at issue, allows the judicial decisionmaker most familiar with the facts of the case and the claims of the parties to consider a variety of factors, including: whether the intervenor obstructed the litigation and erected barriers to the protection of plaintiffs' civil or constitutional rights; whether the intervenor prolonged the litigation; the expense borne by plaintiff as a consequence of such intervention; and whether "'special circumstances would render such an award unjust.'" Hensley, 461 U.S. at 429 (quotation omitted). This flexible approach has produced no undue administrative difficulties or unjust results.

4. In many cases, intervening defendants continue the litigation even after the named defendant concedes the unlawfulness of the challenged acts or policy. To protect the judgment vindicating their civil or constitutional rights, prevailing plaintiffs often have no choice but to continue the litigation against the challenges or appeals raised by the intervenor. The judicial creation of a rule barring recovery of fees incurred by plaintiffs in such circumstances would deter most private efforts to enforce the civil rights laws by placing remedial litigation beyond the financial means of many. Such a rule would force a retreat to the very situation Congress intended to remedy by the enactment of the civil rights fee shifting provisions. Thus, preserving the authority of the district court to award fees in such instances is consistent with

the language of the statutes, the Congressional purpose in enacting these provisions, and previous decisions of this Court.

I. THE EXPRESS TERMS OF THE FEE-SHIFTING STATUTES AND THEIR LEGISLATIVE HISTORIES, REFLECT CONGRESS' INTENT TO GRANT DISTRICT COURTS DISCRETION TO AWARD ATTORNEY'S FEES TO PLAINTIFFS WHO HAVE PREVAILED, EVEN AGAINST INTERVENING DEFENDANTS.

A. Congress Intended Prevailing Plaintiffs To Recover A Reasonable Attorney's Fee.

Congress's overriding purpose in enacting the various civil rights attorney's fee provisions was to enable victims of civil rights violations to obtain lawyers who would help them advance the national policy of enforcing the civil rights laws. See S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976) at 1-6, reprinted in Source Book at 7-12; see also H. Rep. No. 94-1558, 94th Cong.,

2d Sess. (1976) at 2-3, reprinted in Source Book at 210-11; Piggie Park, 390 U.S. at 402. To this end, Congress sought to provide the victorious plaintiffs with a fully compensatory attorney's fee. Recognizing that intent, this Court repeatedly has held that § 706(k) and § 1988 create a strong presumption that a prevailing plaintiff recover a reasonable attorney's fee from the losing parties. See Hensley, 461 U.S. at 429; Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416 (1978); Piggie Park, 390 U.S. at 402 (1968). Only in "exceptional circumstances," see, e.g., Christianburg, 434 U.S. at 417, has a prevailing plaintiff heretofore been denied fees.

Given the scarcity of federal enforcement resources, private plaintiffs are the "chosen instrument of Congress to vindicate 'a policy that Congress

considered of the highest priority.'" Christiansburg Garment, 434 U.S. at 418, quoting Piggie Park, 390 U.S. at 402. Plaintiffs thus have a special statutory mission; they serve as the "private attorneys general" necessary to meaningful enforcement of the civil rights laws. See id. at 417. The fee provisions encourage private actions by making "it easier for a plaintiff of limited means to bring a meritorious suit." Christiansburg Garment, 434 U.S. at 420, quoting 110 Cong. Rec. 12724 (1964) (remarks of Sen. Humphrey).4

4 Congress enacted § 1988, for example, after this Court's decision in Alyeska Pipeline Service Corp. v. Wilderness Society, 421 U.S. 240 (1975), denying fee-shifting in a civil rights case. See discussion at H.Rep. No. 94-1558, 94th Cong., 2d Sess. (1976) at 2-3, reprinted in Source Book at 210-11. Congress found that the Alyeska decision had had a "devastating impact" on civil rights plaintiffs because private lawyers were refusing to take certain types of civil rights cases and "the civil rights bar, already short of resources, could not afford to do so." Id. Congress then recognized that the cost of civil rights litigation imposed a substantial barrier to many deserving plaintiffs. S.Rep. No. 94-1011, 94th Cong., 2d Sess. (1976) at 6, reprinted in Source Book at 12; see also H.Rep. No. 94-1558, 94th Cong., 2d Sess. (1976) at 1, reprinted in Source Book at 209 ("[b]ecause the vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts"). The legislative history of § 706(k) reflects a similar concern for encouraging private enforcement of Title VII laws. See Brief for Respondent Zipes.

The Congressional findings are clear: Allowing fees to plaintiffs with meritorious claims enables them to secure their civil rights; restricting fees discourages such deserving plaintiffs. Contrary to the arguments of the IFFA and its amici, neither the legislative history nor the express terms of the fee statutes suggest that Congress intended to qualify these findings by denying a prevailing plaintiff the right to recover fees from a particular class of opposing parties, such as intervening defendants.

What is instead reflected is the express Congressional intent to confer on district courts broad "discretion" to award fees to prevailing plaintiffs so as to make them whole.

The terms of the statutes themselves demonstrate Congress's focus on protecting and encouraging plaintiffs. The broad language of the fee statutes speaks in an affirmative voice, stating that: in any civil rights action, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . ." § 706(k); see also § 1988. These fee shifting provisions thus identify a singular eligibility requirement: the plaintiff must prevail. Texas Teachers Ass'n. v. Garland School District., No. 87-1759, Slip op. 7-9 (Mar. 28, 1989)

Congress' paramount concern in these fee-shifting statutes was to

"fashion the parameters of eligibility for fee awards, rather than to fix with precision the bounds of liability for such awards, . . ." Charles, 846 F.2d at 1064 (emphasis in original). A district court therefore has authority to award a prevailing, i.e., eligible, plaintiff fees from all parties prevailed against because Congress did not exclude any class of defendants from potential fee liability.

Although the fee statutes do not specifically mention intervening defendants, no intent to exclude intervenors from fee liability can be inferred. Congress has shown that it knows how to exclude parties from fee entitlement or liability when it wants to. Indeed, in § 706(k) itself, Congress expressly excluded the federal government from fee entitlement. Conversely, in the Age Discrimination in Employment Act, 29

U.S.C. § 626(b) (incorporating 29 U.S.C. § 216(b)), Congress explicitly authorized fee assessments only against "defendants" who are "employers," thereby suggesting a fee immunity for non-employer defendants or intervenors in such cases. See Richardson v. Alaska Airlines, Inc., 750 F.2d 763 (9th Cir. 1984).

Obviously, Congress did not include in either § 706(k) or § 1988 restrictive language that would have immunized intervenors from fee liability. Moreover, Congress' intent to grant district courts authority to assess fees against all losing defendants, including intervening defendants, is reflected in the legislative history of § 1988. Thus Congress approvingly cited Sims v. Amos, 340 F. Supp. 691 (M.D. Ala.), aff'd mem., 409 U.S. 942 (1972), in which fees had been assessed against members of the Alabama State Legislature as intervening

defendants. Also significant is the fact that the fees denied in Alyeska, the catalyst for the enactment of § 1988, were fees that had been assessed against intervening defendants. See Alyeska, 421 U.S. at 243.

The broad exemption from fee liability suggested by the IFFA and its amici finds no support in either the terms of the fee shifting statutes or in the legislative history. This Court should not assume a legislative role and rewrite these statutory provisions by creating a per se fee exemption for intervenors.

B. The IFFA And Its Amici Misconstrue The Statutory Language, Legislative History, And Prior Decisions Of This Court, With Their Arguments That The Fee-Shifting Acts Do Not Allow Fee Assessments Against Intervenors.

The IFFA and its amici contend that

fee-shifting statutes grant courts no authority to assess fees against defendant-intervenors, unless the intervenor has violated federal law, or has engaged in conduct that was "frivolous, unreasonable, or without foundation." These arguments disregard the express statutory directives that "prevailing" plaintiffs be awarded fees, and discount the legislative history demonstrating Congress' intent to shift fee liability. These arguments also misread previous decisions of this Court, none of which ruled on intervenor fee liability, and take an inappropriately narrow view of the equities of civil rights litigation.

The IFFA and its amici can find little in the legislative history to support their argument that fees can be awarded against a party only if that party has violated federal law. (IFFA Br. at 20-27; AUL Br. at 20-21.) As

IFFA and its amici condede, the legislative history of the fee statutes reveals that Congress sought to promote several goals. Congress primarily wanted to encourage private citizens to sue to obtain relief for the violations of their rights, thereby serving as private attorneys general and enforcing the nation's civil rights laws to the benefit of all. The Attorney's Fee Act of 1976, H.R. Rep. No. 94-1558, 94th Cong. 2d Sess. (1976) at 1, reprinted in Source Book at 209. By authorizing district courts to award prevailing plaintiffs fees from losing defendants, Congress also hoped to ensure that those who violate the nation's laws do not proceed with impunity. See S.Rep. No. 94-1011, 94th Cong. 2d Sess. (1976) at 2, reprinted in Source Book at 8. In practical effect, however, the latter goal is a logical and desired consequence

of achieving the primary goal.

The secondary congressional goal of deterring violators is not a statutory requirement that would immunize from fee liability those intervenors who may not have violated federal law but who nonetheless have erected substantial barriers to plaintiff's civil and constitutional rights. As set forth above, the eligility requirement of the fee-shifting statutes is precise, simple, and singular. To establish their eligibility for relief, plaintiffs need only demonstrate that they have prevailed against defendants. Nowhere in the terms of any of the civil rights fee provisions did Congress impose, as an additional statutory condition precedent to the assessment of fees, the requirement that the intervening defendant be proved to have violated federal law. By fixating on the second goal, the IFFA and its

amici subtly and improperly convert broad statutory purposes into narrow statutory requirements.

The case law provides no further support for the IFFA's position than does the statutory language. Attorney's fees consistently have been awarded to plaintiffs who prevail on even a "wholly statutory non-civil-rights claim" so long as the case includes a non-frivolous claim that was not ruled upon. See Maher v. Gagne, 448 U.S. 122, 132 (1980). Fees also are awarded to plaintiffs who prevail by showing that a law which has not yet gone into effect, and thus has not yet violated plaintiffs' rights, is unconstitutional. See e.g., In re Kansas Congressional Districts Reapportionment Cases, 745 F.2d 610, 612-13 (10th Cir. 1984). In fact, in Maher this Court specifically held that fees could be awarded to a plaintiff who prevailed

through a settlement, observing: "[n]othing in the language of § 1988 conditions the District Court's power to award fees on . . . a judicial determination that plaintiff's rights have been violated." 448 U.S. at 129.

The argument of the IFFA and its amici that they should escape fee liability because they have not violated federal law appears to flow from a misreading of several of this Court's earlier decisions, including Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). Christiansburg Garment reaffirmed that prevailing plaintiffs in Title VII cases ordinarily should receive fees from losing defendants, but also held that prevailing defendants could recover fees from plaintiffs only if the suit was "frivolous, unreasonable, or without foundation." Christiansburg Garment, 434 U.S. at 421. In so ruling,

the Court reasoned that when a plaintiff prevails, two "equitable considerations" warrant an award of attorney's fees: (1) compensating plaintiff, the chosen instrument of Congress for enforcing federal civil rights laws; and, (2) assessing the fee against a violator of federal law. Id. at 418. These equitable considerations are "wholly absent" when a defendant prevails against a civil rights plaintiff. Id.

In contrast, these equitable concerns are present in the case of a plaintiff prevailing against a defeated intervening defendant. An award of fees to plaintiff achieves Congress' primary goal -- reimbursing plaintiffs with meritorious claims. And, although the intervening defendant may not actually have violated federal law, in most cases such defendants support, encourage, and generally commit substantial resources to

achieve through litigation an outcome that is held to violate federal law. Thus, the intervenors voluntarily align themselves with the violator of federal law, and, in many cases, erect independent obstacles to plaintiff's full recovery. A proper reading of Christiansburg Garment, especially in light of its reaffirmation of the Congressional goal of encouraging private enforcement, supports awarding fees to prevailing plaintiffs, and in appropriate circumstances, assessing them against intervening defendants, thereby achieving important legislative goals.

The other decisions of this Court, cited primarily by IFFA's amici (see, e.g., AUL Br. at 17-19, 22-24), are no more persuasive authority than is Christiansburg Garment for requiring a proven violatation of federal law as a condition precedent to a fee assessment

against intervenors. None of the cases presented the issue of intervenor fee liability. Kentucky v. Graham, 473 U.S. 159 (1987), concerned the scope of a State's Eleventh Amendment immunity from suit and fees, obviously an issue far removed from the case at bar.5 Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980), absolved the Supreme Court of Virginia from fee liability because the Virginia Court had been acting in a legislative capacity, and was thus the beneficiary of absolute legislative immunity when it promulgated regulations governing lawyer advertising. Id. at 733-35, 739. Compare Hewitt v.

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5 In Graham, this Court held that when Eleventh Amendment immunity bars an official capacity suit on the merits against the state official, the scope of that immunity extends to bar the assessment of attorney's fees against the state, even if the plaintiff has prevailed against a governmental employee in his personal capacity. Graham, 473 U.S. at 161.

Helms, 482 U.S. ___, 107 S. Ct. 2672 (1987)(plaintiff not entitled to fees because he never obtained a judgment granting him relief on merits); and Hanrahan v. Hampton, 446 U.S. 754 (1980) (fees not appropriate because plaintiff had succeeded only in reversing an order of summary judgment on behalf of defendants; plaintiff had not secured favorable judgment on the merits).

In determining whether a plaintiff has satisfied the singular requirement of prevailing in the litigation, this Court has adopted a broad definition of "prevailing." See Hensley, 461 U.S. at 440 (in making this evaluation, the lawsuit should be considered as an interrelated whole, with "the extent of plaintiff's success [considered] a crucial factor. . ."). Applying this definition to litigation involving intervening defendants, plaintiffs

prevail when they succeed in achieving some of the benefits sought in the litigation. Neither the IFFA nor its amici dispute that plaintiff here achieved the sought-after benefits -- reinstatement and seniority rights -- in the face of vigorous opposition by the IFFA.

Nothing in the legislative history or in Christiansburg suggests that Congress believed that assessing fees against losing intervenors would be inequitable. When defendant-intervenors zealously try to prevent plaintiffs from enforcing their civil rights, and plaintiffs ultimately prevail against these intervenors, thereby vindicating the rights Congress intended the civil rights laws to protect, it is not at all unfair to require the vanquished intervenors to pay attorney's fees to the plaintiffs. In sum, neither IFFA's case

law nor considerations of equity support the drastic result of depriving the district court of discretion to assess fees against intervenors.

II. THE ASSESSMENT OF FEES, INCLUDING ALLOCATION OF LIABILITY TO INTERVENORS, SHOULD BE LEFT TO THE SOUND EXERCISE OF DISCRETION BY THE DISTRICT COURT, THE JUDICIAL DECISION-MAKER MOST FAMILIAR WITH THE PROCEEDINGS.

In Hensley v. Eckerhart, this Court again recognized that district courts have been vested with broad discretion to make decisions about fee awards, especially the amount of the award. This delegation of authority is appropriate because:

> in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.

Hensley, 461 U.S. at 437.

Decisions of the federal district courts and courts of appeals uniformly support the statutory construction given these fee-shifting statutes by the Court of Appeals below, and reject any absolute rule barring a fee levy against intervenors. Although fees have not been assessed against intervenors in every case in which they were sought, the lower courts addressing the issue have held that Congress bestowed upon the district courts authority to award a prevailing plaintiff attorneys' fees from a defeated intervenor under appropriate circumstances. See, e.g., Nash v. Chandler, 848 F.2d 567 (5th Cir. 1988); Charles v. Daley, 846 F.2d 1057 (7th Cir. 1988);[6] Reeves v. Harrell, 791 F.2d 1481

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6 Compare Wynn v. Scott, No. 75 C 3975 (N.D. Ill., Mem. Op., Jan. 11, 1980) (prevailing plaintiffs in suit challenging an unconstitutional state law precluded from recovering all of their fees from the governmental defendants when plaintiffs had not sought fees from

(11th Cir. 1986), cert. denied, 479 U.S. 1033 (1987); Haycraft v. Hollenbach, 606 F.2d 128 (6th Cir. 1979); Daggett v. Kimmelman, 617 F. Supp. 1269 (D.N.J. 1985), aff'd in part, rev'd in part, 811 F.2d 793 (3d Cir. 1987); Akron Center for Reproductive Health v. City of Akron, 604 F.Supp. 1268 (N.D. Ohio 1984); May v. Cooperman, 578 F. Supp. 1308 (D.N.J. 1984), aff'd in part, fee appeal dism'd, 780 F.2d 240 (3d Cir. 1985); Vulcan Society of Westchester County v. Fire Dept. of the City of White Plains, 533

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intervening defendants who had played a major role in the litigation). This is an erroneous result, which this Court should guard against. Should the Court find that intervening defendants are immune from fees under § 706 (k) (and perhaps by implication under § 1988), it should remand this and other pending cases with instructions to consider whether full fee liability should be assessed against the named defendants. Only through such an order will the objective of the fee acts not be frustrated.

F.Supp. 1054 (S.D.N.Y. 1982);7 Moten v. Bricklayers, 543 F.2d 224 (D.C. Cir. 1976). These cases recognize the discretionary authority of the district courts, pursuant to the civil rights attorney's fee provisions, to assess fees against intervenors.

Consistent with these decisions and the intent of Congress that prevailing plaintiffs receive a reasonable fee, this Court should unequivocally recognize authority within the district court to decide not only the total dollar value of the reasonable fee owed plaintiff, but also whether that amount should be paid

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7 Contrary to the suggestion made by the Union and its amici, the Second Circuit has not addressed the issue of whether intervening defendants can be held liable for fees under the civil rights attorney's fee provisions. The case cited by the Union and others, Annunziato v. The Gan, Inc., 744 F.2d 244 (2d Cir. 1984), did not involve the question of intervening defendant's fee liability, but rather that of a named defendant, who was, for all practical purposes, an "innocent" bystander. Id. at 253.

by all defendants, jointly and severally, or allocated specifically, including allocation upon intervening defendants. In exercising its discretion, the district court should consider a variety of factors, as have the courts previously called upon to assess fees against intervenors, including but not limited to: whether the intervenor obstructed the litigation and erected barriers to the protection of plaintiffs' civil or constitutional rights; whether the intervenor prolonged the litigation; the expense borne by plaintiff as a consequence of such intervention; and, whether any "'special circumstances would render such an award unjust.'" Hensley, 461 U.S. at 429 (quotation omitted).8

8 For a further exposition of the various factors that might be considered by a district court, see Tamanaha, "The Cost of Preserving Rights: Attorneys' Fee Awards and Intervenors in Civil Rights Litigation," 19 Harv. C.R.-C.L. L. Rev. 109, 142-53 (1984).

Obstruction of the litigation and imposition of additional burdens upon plaintiffs' is one factor the courts below appropriately have been sensitive to when determining whether to assess fees against intervening defendants. Through the voluntary act of intervention, the intervenor often seeks to prevent plaintiff from vindicating the rights guaranteed under the civil rights laws. It is of little comfort to a plaintiff, trying to obtain relief for a violation of his or her rights, that one of the opposing parties trying vigorously to bar relief was not a named defendant and may not actually have violated federal law. See e.g., Haycraft v. Hollenbach, 606 F.2d 128, 132 (6th Cir. 1979)(fees assessed against intervening defendant, a state judge, whose alternate desegregation plan "imposed a substantial barrier to the realization of the full

constitutional rights of [plaintiffs]").9 See also Vulcan Society of Westchester City v. Fire Dep't, 533 F. Supp. 1054, 1062 (S.D.N.Y. 1982)(assessment of attorney's fees appropriate because intervenor "litigated vigorously in an attempt to deny plaintiffs various aspects of the relief that plaintiffs sought . . ."); Contrast Kirkland v. New York State Dep't of Correctional

9 As an independent basis for its decision, the Court of Appeals also found that the intervenor judge had litigated in bad faith. 606 F.2d at 133.

District courts within the Sixth Circuit have exercised their discretion and have assessed fees against intervening defendants when appropriate under the circumstances of the case. See Akron Center for Reproductive Health v. City of Akron, 604 F. Supp. 1268 (N.D. Ohio 1984)(fees assessed against intervenors). Contrast Wolfe v. Stumbo, No. C-80-0285 (W.D. Ky. 1983)(fees not assessed against intervenors because their involvement did not amount to "obstinancy" in resisting plaintiffs realization of their constitutional rights); and Planned Parenthood of Memphis v. Alexander, No. 78-2310 (W.D. Tenn. 1981)(same).

Services, 524 F. Supp. 1214 (S.D.N.Y. 1981).

In many such cases, whether intentional or not, intervenors easily could became the main force opposing the plaintiffs, with the government attorneys in large part riding the coattails of the intervenors. See Charles, 846 F.2d at 1064-65. Similarly, in the private employment context, employers could well try to recruit and underwrite claims of non-party employees, who could object to plaintiffs' claims or the relief they seek. See also, Zipes, 846 F.2d at 440-441.

Congress' primary goal of encouraging private enforcement of the civil rights laws would be eviscerated by prohibiting the assessment of fees against intervening defendants, especially when the intervenor continued to litigate after the named defendant

conceded the unconstitutionality of the challenged action. See, e.g., Charles v. Daley, 846 F.2d 1057, 1061 (7th Cir. 1988) (plaintiffs incurred more than $100,000 in fees to defeat intervenor appeal to the Supreme Court after the governmental defendants had conceded that the challenged statute was unconstitutional).10 Indeed, even the Solicitor General concedes that denying plaintiff fees when intervenors prolong the litigation could serve as a disincentive to the civil rights plaintiffs. (S.G. Br. at 19 n.14.)11 A

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10 As the Court of Appeals observed, intervening defendants had "engaged the plaintiffs in a protracted court battle to the extent that even the governmental defendant, the State of Illinois, was unprepared to go." Charles, 846 F.2d at 1065 n.11.

11 Contrary to the extended arguments made by AUL, neither the plaintiffs in the case before the Court, or in other intervenor cases, advance a "work theory" of entitlement to fees. The "additional work" plaintiffs must do is not the basis

better strategy for chilling potential plaintiffs is difficult to conceive.12

Contrary to the argument the Solicitor General makes, intervenor status should not automatically constitute a "special circumstance" that justifies refusing prevailing plaintiffs fees. See Tamanaha, "The Cost of Preserving Rights: Attorneys' Fee Awards and Intervenors In Civil Rights Litigation," 19 Harv. C.R.-C.L. L.Rev.

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for granting them fees; rather, it is an equitable consideration that determines the amounts of a reasonable fee. This work is relevant simply because Congress expressed its intent that plaintiffs be reimbursed for the "work" expended in prevailing.

12 The IFFA does not contend and thus has waived the argument that an assessment of fees would violate the First Amendment. Moreover, the factual record suggests no restriction on First Amendment expression flowing from an assessment of fees. Thus, this case does not provide an appropriate vehicle for deciding the question raised only by amicus AUL.

109, 143 (1984). Nonetheless, even after having determined that plaintiff has prevailed, a few courts have recognized a "functional plaintiff" exception in determining fee liability. Whether this concern should be considered a "special circumstance," see Reeves v. Harrell, 791 F.2d 1481 (11th Cir. 1981), cert. denied, 479 U.S. 1033 (1987), or a part of the allocation question itself, the district courts should be free, and are in the best position, to determine the extent of the intervenor's fee liability.

Indeed, none of the cases recognizing the potential of a functional plaintiff exception hold or imply that the fee-shifting statutes deny the district court the requisite authority to assess fees against all defendant-intervenors. Instead, these cases merely recognize district court discretion to consider this factor. However, this

circumstance must be read narrowly, if at all, because given the clever imaginations of many lawyers, a broad functional plaintiff exception would soon swallow the fee-shifting provisions of the civil rights acts. See Ketchum v. City Council of City of Chicago, No. 82 C 4088 (N.D. Ill. March 24, 1986). 13

CONCLUSION

Strong policy reasons demonstrate the propriety of preserving a district court's discretion to assess fees and, further, militate against creating broad exceptions exempting intervening defendants from all fee liability. The

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13 The extent of manipulation attempted in the district courts is illustrated by the defendant intervenors Chicago aldermen, who in the face of prevailing plaintiffs' fee petition, sought unsuccessfully to realign themselves as plaintiffs after vigorously and unsuccessfully opposing a court-approved redistricting plan. Ketchum v. City Council of City of Chicago, No. 82 C 4085 (N.D. Ill. March 24, 1986).

near-absolute immunity for intervenors, as proposed by the IFFA and its amici, would indeed give new, and most unintended meaning to the term "fee-shifting."

Respectfully submitted,

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